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No. _____

IN THE

Supreme Court of the United States

WILLIE POLE,

Petitioner,

v.

AUSTIN RANDOLPH, Acting Warden of Logan Correctional Center,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a district court's failure to exercise its discretion based on a misapprehension of law — in this case, because of an erroneous view that a prisoner's *pro se* reconsideration motion constituted a successive habeas petition — constitute an abuse of discretion requiring a remand so that the district court can exercise its discretion in the first instance?

PARTIES TO THE PROCEEDING

The petitioner is Willie Pole, the plaintiff and appellant below in this habeas action. The respondent is Austin Randolph, Acting Warden of Logan Correctional Center, the defendant and appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Willie Pole respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This Petition seeks the review of the decision of the Seventh Circuit in *Pole v. Randolph*, reprinted at Pet. App. A and published at 570 F.3d 922 (7th Cir. 2009). The court of appeals affirmed the district court's order denying Pole's petition for a writ of habeas corpus. The district court's order denying the petition is reprinted at Pet. App. B and is not otherwise published.

JURISDICTION

The Seventh Circuit entered an opinion on July 7, 2009 affirming the denial of Pole's habeas petition. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Sixth Amendment of the Constitution, Section 2254 of Title 28 of the United States Code, and Federal Rule of Civil Procedure 59 are reprinted in the appendix to this petition at Pet. App. E.

STATEMENT OF THE CASE

Pole was convicted of murder and attempted armed robbery on January 19, 1996, after a jury trial in Illinois state court. He currently is incarcerated at the Logan Correctional Center in Lincoln, Illinois.

The appeal below stemmed from the district court's denial of Pole's federal habeas petition, which Pole filed in 2002 after exhausting his state-court remedies. The central issue below concerned whether the failure of Pole's trial counsel to introduce the results of gunshot residue tests — which were taken within hours of the crime and which indicated that Pole had not recently fired a gun — met minimum constitutional requirements for effective assistance under the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003).

Although the State's theory of the case was that Pole personally aimed and fired a gun toward the victim, defense counsel failed to introduce critical tests of gunshot residue showing that Pole had not recently fired a gun — even though Pole had been arrested approximately one hour after the shooting and the tests were conducted almost immediately thereafter. Thus, in a case in which the State presented no physical evidence and no eyewitness evidence showing that Pole fired the fatal shot, defense counsel failed to present crucial physical evidence showing that the State's theory was wrong.

Without conducting an evidentiary hearing, the district court denied Pole's habeas petition. The district court held that (1) the performance of Pole's

state-court counsel did not fall below constitutional minimums, and (2) Pole's petition was procedurally barred because the state appellate court's decision contained independent state grounds adequate to support the judgment. (Pet. App. B, 60a-74a.) The district court also denied Pole's subsequent motion for reconsideration that focused specifically on trial counsel's failure to introduce the gunshot residue tests. (Pet. App. C, 75a-78a.) The district court held that although the reconsideration motion was timely under Fed. R. Civ. P. 59, the motion constituted a successive habeas petition. *Id.*

The underlying facts are these. On September 27, 1994, Bernard Jackson was shot while changing a tire on a van at a tire shop on the south side of Chicago. (SA257-58.) The shot came from an alley a substantial distance away. (SA140.) The State's theory of the case was that Jackson was an innocent bystander killed by a bullet fired in the general direction of rival gang members who were at the shop having new tire rims put on their van. (SA23-34, 191-99.) In particular, the State's theory was that Pole fired a single shot in the direction of the van in an effort to scare or rob other gang members standing near the van. *Id.* Instead, the bullet struck and killed Jackson, an employee changing the van's tire.[1]

Pole's counsel at trial, having failed to cross-examine the State's witnesses about the lack of physical evidence connecting Pole to the crime, chose

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[1] Citations to A__ and SA__ are citations to the Seventh Circuit Appendix and Supplemental Appendix, respectively. Citations to Pet. App. are to the appendices filed with this brief.

to rest the defense without presenting any evidence. (SA183-86.) In doing so, defense counsel failed to present gunshot residue tests on samples obtained from Pole's hands and glove within hours after the crime. (SA494-96, 117-18, 186.) That evidence revealed that, contrary to the State's theory, Pole had not recently fired a gun. (SA494-97.) Defense counsel also rested without having interviewed or presented testimony from Ramon Hamilton, an eyewitness who was standing at the scene of the crime. (SA186; 300-03.) Consequently, the jury never heard Ramon Hamilton's testimony — provided in a subsequent affidavit presented to the district court — denying that Pole fired the shot that killed Jackson. (SA300-03.) Nor did defense counsel interview other prosecution witnesses, such as Ramon Hamilton's sister, Andrea. If counsel had done so, counsel would have obtained testimony (again provided in subsequent affidavits presented to the district court) showing that their prior statements implicating Pole were coerced and untrue. (SA309-10.) Nor did defense counsel interview or present evidence from three other eyewitnesses standing at the scene of the crime, all of whom had been identified to counsel along with their addresses. (SA186.) Defense counsel presented no evidence at all.

Having heard no evidence on Pole's behalf, the jury returned a guilty verdict on the counts of first degree murder and attempted armed robbery. (SA223.) Pole was sentenced on March 1, 1996 to 44 years for first degree murder and 15 years for attempted armed robbery, to be served concurrently.

(A6; SA230-231.) In his elocution at sentencing, Pole protested his innocence and articulated many of the issues of ineffective assistance of counsel raised in his subsequent petition. (SA226-29.)

On direct appeal to the Illinois Appellate Court, Pole argued that he had received ineffective assistance of counsel because defense counsel failed to introduce the results of the gunshot residue tests exonerating Pole. (SA256.) The Illinois Appellate Court affirmed in a written order. (SA256-68.) Pole subsequently filed a petition for leave to appeal to the Illinois Supreme Court. (A6.) On December 2, 1998, the Illinois Supreme Court denied the petition. *Id.* Thereafter, Pole sought post-conviction relief in the Illinois circuit court. (A6; SA330-335.) The Illinois circuit court denied his request (*id.*), and the Illinois Appellate Court affirmed in a written order (SA300-10). The Illinois Supreme Court denied Pole's petition for leave to appeal on June 29, 2001. (SA336.)

District court proceedings. On May 10, 2002, after exhausting his state court remedies, Pole filed in the district court a petition for a writ of habeas corpus, arguing that he had received ineffective assistance of counsel in the state court. (SA232-53.) Pole also requested an evidentiary hearing. (SA393.) The district court had jurisdiction over Pole's petition pursuant to 28 U.S.C. § 2241. On August 9, 2005, without conducting an evidentiary hearing, the district court issued an order denying habeas relief. (Pet. App. B, 60a-74a.)

The district court held that Pole's claims for ineffective assistance of counsel "are procedurally

barred under § 2254" because the "claims were previously raised in Pole's direct appeal of his conviction." (Pet. App. B, 70a.) According to the district court, the "appellate court's decision was based on independent state grounds, and were 'adequate to support the judgment.'" *Id.* The district court did not explain what those "independent state grounds" were or how they supported the judgment. *Id.*

Out of "an abundance of caution," the district court then proceeded to address the "substantive aspects of Pole's motion." *Id.* However, the district court did not address the gunshot residue issue identified in the habeas petition — Pole's argument that the test "conclusively shows that no gun shot residue was found on the glove[] he [Pole] allegedly was wearing when the fatal shot allegedly was fired." (SA243.)

With respect to the matters that the district court did address, the court rejected Pole's contention that his defense counsel's performance at the pre-trial suppression hearing was ineffective. (Pet. App. B, 71-73a.) Pole had complained that his defense counsel had not called him as a witness or presented any other evidence at the suppression hearing, even though Pole had told defense counsel that: (a) the statement allegedly given by Pole had been drafted by the Assistant State's Attorney, not Pole; (b) Pole signed the statement at 6:45 a.m. in the morning following his arrest, after interrogators had kept Pole awake all night, handcuffed to a wall in the interrogation room, since his arrest at 8:30 p.m. the prior evening; (c) Pole signed the statement without

reading it because he was scared and exhausted from his ordeal; and (d) Pole signed the statement based on the false representation by the Assistant State's Attorney that the statement incriminated Ramon Hamilton and declared that Ramon, rather than Pole, had fired the fatal shot. (Pet. App. B, 73a; SA251-253, 290-299.) The district court held that, even though defense counsel did not call Pole as a witness at the suppression hearing to establish those facts, defense counsel at least had advanced a theory that Pole was sufficiently young, inexperienced, and naïve about the judicial system so as to render his confession involuntary. (Pet. App. B, 71a-73a.)

With regard to Pole's claims that defense counsel had done essentially nothing to investigate the case for trial, the district court rejected all of the affidavits submitted by Pole from witnesses describing what they would have said if they had been interviewed or called. *Id.* Those affidavits included one from Ramon Hamilton. (SA300-03.) Ramon's affidavit stated that, contrary to the State's theory of the case and contrary to Pole's purported statement to the Assistant State's Attorney, Pole did not fire the fatal shot. (SA301.)

The district court held that Ramon Hamilton's affidavit "adds nothing" to Pole's ineffective assistance of counsel claim because "Ramon's affidavit indicates that he was not present at the time the gun was fired." (Pet. App. B, 72a.) The district court stated (*id.*):

> The [state] appellate court, upon review of Pole's Post-Conviction petition, found the petition and supporting affidavits

> inadequate to constitute a sufficient claim for relief. Ramon's affidavit indicates that he was not present at the time the gun was fired. Such information adds nothing to the issue of Pole's guilt or innocence. Therefore, the affidavit could not change the outcome of Pole's jury trial, and as a result, Pole's ineffective assistance of counsel claim must fail.

In reality, the affidavit says the opposite of the district court's conclusion. (SA301.) The affidavit states that Ramon indeed was present at the time the gun was fired. *See* SA300-301 ("I [Ramon] said I got a gun on me . . . I showed him the gun. . . . Lontray reached for the gun, the gun went off").

Shortly after the district court denied his petition, Pole filed a *pro se* motion for reconsideration. (Pet. App. F, 90a-99a.) In that motion, Pole repeated that his counsel was ineffective by failing to introduce the gunshot residue test results: "If Counsel would present the result of the Petitioner negative gun shot residue tests on the defendant hands and alleged glove with the affidavit of Ramon Hamilton would have show that it was impossible that the Petitioner fired that fatal shot." *Id.* at 98a, *sic.* Pole also stressed that the district court had misread Ramon Hamilton's affidavit. *Id.* at 91a-99a. Pole argued that, contrary to the district court's conclusion, the "Ramon Hamilton Affidavit stated he was present at the time . . . the shot was fired." *Id.* at 94a.

On August 1, 2006, the district court denied Pole's motion for reconsideration without addressing the substantive issues raised. (Pet. App. C, 75a-78a.) The district court determined that the motion amounted to a successive petition which the court lacked jurisdiction to consider. *Id.* at 77a.

Seventh Circuit proceedings. Pole filed two notices of appeal, one from the district court's original order denying the petition (Appeal No. 06-2768), and the other from the district court's order denying the motion for reconsideration (Appeal No. 06-3281). (SA442-49, 468-69.) On September 21, 2006, the Seventh Circuit appointed the undersigned counsel to represent Pole.

On January 18, 2007, the Seventh Circuit issued an order in the second appeal holding that "[t]he district court erred in characterizing Pole's filing as a successive habeas petition. The court should have treated that filing as a timely filed motion for reconsideration and should have decided it on the merits." (Pet. App. D, 81a.) The Seventh Circuit then amended the previously issued certificate of appealability to include the reconsideration motion, and the Seventh Circuit consolidated both appeals. *Id* at 83a.

On July 7, 2009, the Seventh Circuit affirmed the district court's denial of the habeas petition and the denial of the reconsideration motion. On the key issue of trial counsel's failure to introduce the gunshot residue evidence, the Seventh Circuit did not dispute that the failure was prejudicial — that counsel's failure to introduce the most important physical evidence in the case was "sufficient to

undermine confidence in the outcome." (Pet. App. A, 21a.) Instead, the Seventh Circuit held that the argument was forfeited. *Id.* at 29a. The Seventh Circuit ruled that, even though the issue was specifically addressed by the state appellate court in Pole's state court proceedings, the issue was not raised adequately in the district court. *Id.* In doing so, the Seventh Circuit itemized each of the five occasions that Pole raised the issue in the district court: the first time in Pole's habeas petition; the second time in his supporting habeas brief; the third time in his *pro se* motion for reconsideration; the fourth time in his *pro se* reply brief in support of the motion for reconsideration; and the fifth time in his *pro se* notice of appeal. *Id.* at 30a-32a.

The Seventh Circuit held that the gunshot residue issue was not adequately presented to the district court until Pole filed his *pro se* motion for reconsideration, to which he attached a copy of the gunshot residue test. (Pet. App. A, 31a.) According to the Seventh Circuit, raising the issue in Pole's *pro se* reconsideration motion was too late. It was too late even though the Seventh Circuit agreed that the district court erred in failing to address the merits of the reconsideration motion because the district court mistakenly deemed it to be a successive habeas petition: "[T]he district court erred in characterizing the motion to reconsider as a successive *habeas* petition. . . . [T]he district court should have treated the motion as a timely filed motion for reconsideration and decided it on the merits." (Pet. App. A, 19a.)

In other words, even though the district court failed to exercise its discretion regarding the merits of the reconsideration motion — because the district court erroneously thought that "it lacked jurisdiction over the motion to reconsider because it was an unauthorized attempt to litigate a successive collateral attack on his sentence" (*id.* at 18a) — the Seventh Circuit concluded that the issue was forfeited because it was not adequately raised in the district court.

REASONS FOR GRANTING THE WRIT

This Court should resolve the confusion among the circuits regarding the effect of a district court's failure to exercise its discretion. District courts obviously possess significant discretion in administering cases in an orderly fashion. However, there is disagreement among the circuits over the remedy when a district court does not exercise its discretion — whether because of inattention or a misapprehension of law. Here, the district court failed to exercise its discretion concerning whether to consider critical gunshot residue evidence because of the district court's erroneous view that a *pro se* reconsideration motion constituted a successive habeas petition.

This Court should establish a clear rule concerning whether a district court's failure to exercise its discretion requires a remand so that the district court can exercise its discretion in the first instance. The Seventh Circuit below held that no remand was necessary because, so long as the district court's judgment was within the realm of a

proper exercise of discretion — *if* the district court had exercised it — the judgment can be affirmed without requiring a remand so that the district court actually can exercise its discretion. Other circuits disagree. Some circuits hold that a district court's failure to exercise its discretion requires a remand so that the discretion can be exercised by the district court in the first instance in order to vindicate the policies underlying the existence of that discretion. Other circuits apply a harmless error analysis, holding that a remand is necessary when a district court fails to exercise its discretion unless the error is harmless. Other circuits hold that when a district court fails to exercise its discretion, the appellate court can exercise its own discretion in the stead of the district court.

This Court should resolve the split.

This Court Should Grant Certiorari To Resolve Confusion Among The Circuits Concerning The Effect Of A District Court's Failure To Exercise Its Discretion At All.

The circuits generally agree that a district court's failure to exercise discretion constitutes an abuse of discretion. *See, e.g., Janney Montgomery Scott LLC v. Tobin*, 571 F.3d 162, 166 (1st Cir. 2009) ("a trial court can abuse its discretion by failing to exercise that discretion") (quoting *In re Grand Jury Investigation*, 545 F.3d 21, 25 (1st Cir.2008)); *United States v. Brantley*, No. 07-3575, 2009 WL 2618811, at *4 (3d Cir. Aug. 27, 2009) ("the court abdicated its discretion, and thereby abused that discretion"); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993)

(the "most obvious manifestation" of an abuse of discretion "is in a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion"); *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (a "district court's failure to exercise discretion constitutes an abuse of discretion"). *See generally Foman v. Davis*, 371 U.S. 178, 182 (1962) (an "outright refusal to grant . . . leave [to amend] without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the Federal Rules").

The confusion arises in what should be done when a failure to exercise discretion occurs. There are at least four approaches among the circuits.

Some circuits hold that a district court's failure to exercise its discretion requires a remand so that the district court can exercise its discretion in the first instance. The reasoning of those circuits is that requiring remand vindicates the policy considerations for placing discretion with the district court in the first place — such as benefiting from the district court's proximity and superior vantage point in evaluating the litigants and competing interests. *See, e.g., Janney*, 571 F.3d at 166 (1st Cir. 2009) (remanding case where district court abused its discretion by failing to rule on defendant's motion for attorneys' fees: "[T]he best we can do on the current state of the record is to conclude that the district court abused its discretion by not exercising it."); *James*, 6 F.3d at 243 (4th Cir. 1993) (remanding case where district court failed to consider the plaintiff's

request for anonymity in a highly sensitive case: "[R]emand . . . demonstrates our recognition of the continued superiority of the trial court's vantage point in making this sort of discretionary decision respecting the conduct of trials.").

Other circuits apply a harmless error overlay to the same approach. Those circuits hold that a remand is necessary when a district court fails to exercise its discretion unless the error is harmless. *See, e.g., Brantley*, 2009 WL 2618811, at *4-5 (3d Cir. 2009) (district court "abdicated its discretion and thereby abused that discretion" in deferring to U.S. Marshals as to whether a criminal defendant should be shackled during trial, but error was harmless because it did not affect the verdict); *Told v. Interwest Constr. Co., Inc.*, 267 Fed. Appx. 807, 811 (10th Cir. 2008) (district court abused its discretion in failing to rule on the plaintiff's motion to amend the complaint, but error was harmless because the record revealed "a clear reason for the implicit denial"); *United States v. City of Philadelphia*, 798 F.2d 81, 90-91 (3d Cir. 1986) (district court erred in failing to exercise its discretion regarding a motion to intervene, but error was harmless: "We agree with the Task Force that the district court failed to exercise its discretion in the sense that, at least on the record before this court, it did not address the request presented. . . . [W]e conclude that the denial of its motion to intervene permissively constituted harmless error.").

Other circuits hold that when the district court fails to exercise its discretion, the appellate court can exercise its own discretion rather than

remand to the district court. *See, e.g., Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1178 (9th Cir. 2006) (district court erred in failing to address plaintiff's motion to compel discovery before considering defendant's motion for summary judgment, and the Ninth Circuit remedied the error by considering the motion to compel "de novo"); *Vinci v. Consol. Rail Corp.*, 927 F.2d 287, 288 (6th Cir. 1991) (district court's "failure to exercise discretion" concerning filing of pretrial order constituted "abuse of discretion," which the Sixth Circuit remedied by outright reversal rather than remand for exercise of discretion); *Miller*, 905 F.2d at 262 (9th Cir. 1990) (district court erred in dismissing habeas petition filed in wrong district without considering whether it should be transferred to a proper district: "A district court's failure to exercise discretion constitutes an abuse of discretion," but appellate court "need not remand with directions to consider whether to transfer" because appellate court could decide the issue).

Here, the Seventh Circuit applied a different variation of the no-remand approach. The Seventh Circuit held that no remand was necessary because, so long as the district court's judgment was within the realm of a proper exercise of discretion — if the district court actually had exercised it — the judgment can be affirmed without requiring a remand. The Seventh Circuit ruled that Pole did not squarely raise his trial counsel's failure to introduce the results of the gunshot residue test until Pole's "*pro se* motion for reconsideration." (Pet. App. A, 31a.) According to the Seventh Circuit, "There, for

the first time in federal proceedings, [Pole] argued that if his attorney had presented the scientist who conducted the test and the results of the test, he would have been able to prove he was not the shooter." *Id.*

The Seventh Circuit recognized that the district court never ruled on the merits of the *pro se* reconsideration motion. The Seventh Circuit stated that the district court did not do so because the district court "found that it lacked jurisdiction over the motion to reconsider because it was an unauthorized attempt to litigate a successive collateral attack on his sentence." (Pet. App. A, 18a.) The Seventh Circuit agreed that the district court's failure to address the reconsideration motion constituted error based on a misapprehension of law: "[T]he district court erred in characterizing the motion to reconsider as a successive *habeas* petition." *Id.* at 19a. The Seventh Circuit held that "the district court should have treated the motion as a timely filed motion for reconsideration and decided it on the merits." *Id.*

Nevertheless, the Seventh Circuit held that the district court's failure to exercise its discretion did not require a remand because the district court would have been within its rights — if it had considered the issue — to deny the reconsideration motion because the gunshot residue argument purportedly was new. According to the Seventh Circuit, the "reference to the gunshot residue tests came too late" because "[a]rguments raised or developed for the first time in a motion to reconsider are generally deemed forfeited." (Pet. App. A, 31a-

32a, citing *Mungo v. Taylor*, 355 F.3d 969, 978 (7th Cir. 2004).)

The Seventh Circuit's approach to the district court's concededly erroneous failure to exercise its discretion is inconsistent with the approaches of other circuits. The approach abrogates the policy justifications for requiring a district court — with its proximity to the litigants and issues — to exercise its discretion in the first instance. *See, e.g., James*, 6 F.3d at 243 (4th Cir. 1993) ("[R]emand ... demonstrates our recognition of the continued superiority of the trial court's vantage point in making this sort of discretionary decision respecting the conduct of trials.").

The harshness of the Seventh Circuit's approach is compounded in Pole's case because there had been no evidentiary hearing on the habeas petition, even though Pole expressly had requested one. *See* SA393 ("Petitioner prays the Court ... will order an evidentiary hearing on these claims."). Thus, the Seventh Circuit decided the issue on a paper record, without the benefit of, or the opportunity to obtain, testimony that could aid in the exercise of discretion. Unlike the appellate court, the district court has the ability to conduct an evidentiary hearing to enlighten the application of its discretion — especially where, as here, the failure to introduce key physical evidence in the underlying case unquestionably was prejudicial.

Therefore, this Court should grant certiorari to resolve the confusion among the circuits as to whether a district court's failure to exercise its

discretion requires a remand so that the district court can exercise its discretion in the first instance.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Dated: October 5, 2009

Respectfully submitted,

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Appendix

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

WILLIE POLE,
Petitioner-Appellant,

v.

AUSTIN RANDOLPH, Acting Warden
of Logan Correctional Center,
Respondent-Appellee.

Nos. 06-2768, 06-3281.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 C 3393—**Charles R. Norgle, Sr.,** *Judge.*

Argued Sept. 21, 2007.
Decided July 7, 2009.

Before EASTERBROOK, *Chief Judge*, and KANNE and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* Willie Pole was convicted of first degree murder and attempted armed robbery in the State of Illinois. He appeals the denial of his petition for a writ of *habeas corpus*, arguing that his attorney provided ineffective

assistance at his trial and on appeal. We affirm the district court's denial of his petition.

I.

We begin with the facts as presented at trial. Bernard Jackson went to work on September 27, 1994, even though it was his day off. Accompanied by his girlfriend, Carmania Payton, and his seven-year-old son, Terrence, he hoped to earn some extra money at the E & J Tire Service shop where he worked with his brother, Larue. Bernard arrived at the shop a few hours before its 7 p.m. closing time, joining his brother and another worker, Antoine Patillo. Patillo left work a little early that day and shortly after he left, Willie Pole arrived at the shop looking for him. Pole asked Larue where Patillo was, and Larue told him Patillo had just left. As the two men were talking, a red van pulled into the shop. Three men in the van wanted to exchange the van's tires with replacements they were carrying in the back of the vehicle. Even though the shop's owner was about to close for the day, Bernard offered to stay and change the tires. While Bernard waited on the men in the van, Pole asked Larue whether the three men were members of the Gangster Disciples street gang. Larue replied that he did not know. Pole then used a payphone at the shop to make a call, and Larue left work to go to a nearby store. The shop's owner went to a business next door to the tire shop, leaving Bernard to work on the van.

Pole was a member of the Blackstone gang, a rival of the Gangster Disciples. After making a

phone call, he left the shop and met up with other members of the Blackstones, including Ramon Hamilton. He told Ramon about the Disciples at the tire shop, and they hatched a plan to rob the Disciples of their jewelry. They drove past the shop to verify that the men were still there, and made gang signs identifying themselves and disparaging their rivals. They parked and began to approach the tire shop through the alley behind it. Pole pulled up his hood to hide his face. Ramon carried a handgun and wore a ski mask.

Two of the men that Pole believed were Disciples were standing near the van at the time. The third was inside the shop. Carmania Payton and Terrence were also standing near the van, a few feet away from Bernard as he worked to change the tires. The shop's owner was just returning because someone had come to tell him there was going to be trouble at the shop. After asking Bernard if everything was alright, the shop's owner turned to walk away. As he turned, he heard a gunshot. Although Pole now denies that he pulled the trigger, he later told the police that Ramon showed him how to release the safety, and he pointed the gun at the Disciples standing near the van and fired. He was standing forty or fifty feet away from his target at the time. The badly aimed bullet struck Bernard in the back and exited through his chest. He fell to the ground in front of his girlfriend and son, exclaiming, "I think I'm hit." The shop's owner called for everyone to get down. Willie Pole and Ramon Hamilton fled the

scene. When everything appeared to be clear, everyone stood up except Bernard.

Pole placed the gun in his car, but then abandoned the car. He and Ramon fled in separate directions. Larue returned to a frantic scene. The police and an ambulance were summoned, and Bernard was pronounced dead at a nearby hospital less than an hour later. Larue and other witnesses at the scene told the police about Pole's visit to the shop, his inquiry about the men in the van, and the car that drove by flashing gang signs before the shooting. The police began to look for the car. At about this same time, Pole showed up at Ramon Hamilton's house. Ramon's twelve-year-old sister, Andrea Hamilton, answered the door. Pole asked her to walk with him to retrieve his car because there were police in the area. As Andrea and Pole walked to the car, they met Karen Wills, a friend of Andrea's, and she joined them in the walk back to the car. When they got to the car, Pole removed a gun and a glove from the car and handed them to Andrea, asking her to hide them for him. He told her he had shot a "Sipe," *i.e.*, a Disciple, and he instructed her to place the gun in the front of her pants. All three entered the car and Pole drove Andrea home. Andrea hid the gun, still loaded except for the single spent bullet, in a drawer and placed the glove on her dresser. After dropping Andrea off, Pole told Karen Wills that he had confronted some Disciples and fired a shot at them.

Two police officers spotted Pole and Wills shortly thereafter, in a car matching the description given by

witnesses to the crime. They took the two into custody and at approximately 8:30 p.m., witnesses from the tire shop confirmed that Pole was the man who had asked about the alleged Disciples and then flashed gang signs shortly before the shooting. Wills told the police that she did not know what was going on, but that Pole had given a package to Andrea Hamilton. Pole and Wills then led the police to the Hamilton home. In the meantime, Ramon Hamilton had arrived home and learned that Pole had asked Andrea to hide the gun. Ramon took the gun from Andrea's drawer and hid it outside his house. When the police arrived, Andrea told them she had given the gun to Ramon, who subsequently handed over to the police officers both the gun and the glove. Pole's name was written on the glove. The officers took Pole, Wills, Ramon and Andrea Hamilton and the Hamiltons' mother, Bonnie, to the police station for questioning.

Two officers questioned Pole at first. He told them he had gone to the tire shop to see Patillo, who owed him some money. After he saw the three men he believed were Gangster Disciples, he went around the corner and told some of his cohorts from the Blackstones that there were "Sipes" at the tire shop. The Blackstones got into two cars and drove past the tire shop. Pole told the officers that, at Ramon's suggestion, the Blackstones decided to rob the Disciples. Ramon retrieved a gun from his house, and Pole told the officers he went along because he was considered a "pigeon" or a "white boy" among the Blackstones and he wanted to prove himself. In this

first statement, Pole told the police that Ramon was showing him how to work the safety on the gun when it accidentally discharged in the direction of the van. Pole told the officers that he panicked and ran.

After questioning Ramon, the officers came back to Pole and told him his story did not match Ramon's version of events. Pole then told the officers a story similar to his first account, but this time stated that Ramon was wearing a ski mask, and that Ramon directed Pole to put up his hood as they walked through the alley toward the back of the tire shop. In this second version, Pole admitted that he pointed the gun at the men near the van and fired a single shot before fleeing.

The police officers and an assistant state's attorney ("ASA"), Tom Biesty, then interviewed Andrea and Ramon Hamilton, and Karen Wills as well, taking written statements from each before returning to Pole to record his statement.[1] ASA Biesty took Andrea Hamilton's statement at 1:30 a.m., and she confirmed that Pole had asked her to walk to the car with him. She reported that Pole told her he had shot someone at the tire shop, and that they met up with Karen Wills on the way to Pole's car. She said that Pole asked her to hide the gun and glove once they reached the car. She had given the gun to her brother Ramon when he came home

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[1] Karen Wills' statement is not part of the record on appeal but Pole seems to concede that her trial testimony was consistent with her written statement. Bonnie Hamilton was present for the questioning of both Ramon and Andrea because they were minors.

asking about it. Both Andrea and Bonnie Hamilton signed each page of Andrea's statement.

At 4:20 a.m., approximately nine hours after the shooting, ASA Biesty recorded Ramon's statement. Ramon told Biesty that Pole came to his house after spotting the Gangster Disciples at the tire shop. Pole asked Ramon for a gun so that he could rob the Blackstones of their jewelry. Ramon and Pole drove past the shop in separate cars, Ramon with three other Blackstones-Lontray, Thaddeus and Thomas-and Pole driving behind them in his own car. The group flashed gang signs and then parked in the alley behind the shop. Ramon released the safety on the gun at Pole's request, and Pole then walked toward the shop and fired a shot at the Disciples. The two fled in different directions but met up again later. Pole told Ramon that he had given the gun to Andrea. Ramon went home and retrieved the gun from Andrea and hid it near the side of his house. Both Ramon and his mother, Bonnie Hamilton, signed each page of his statement.

ASA Biesty then met with Pole to take his statement. The shooting had occurred between 7 and 8 p.m., and it was now 6:45 a.m., approximately eleven hours after Pole had been taken into custody. As ASA Biesty later testified, he sat next to Pole, read him his rights, and wrote out Pole's statement by hand. Biesty had Pole read back to him the first paragraph of the statement to make certain that Pole could read and understand it. In the statement, Pole admitted he was a member of the Blackstone gang. He told Biesty that after seeing the three men at the

tire shop, he went to Ramon's house and met with Ramon, Lontray, Thaddeus and Thomas, fellow Blackstones that Pole identified only by their first names. Ramon suggested that they rob the Disciples of their jewelry. Ramon told the group that he had a gun. Pole told ASA Biesty that he took the gun from Ramon and that they then drove up to the alley behind the tire shop. There, Pole put on a white work glove marked with his name, the same glove later retrieved from Ramon's house. He pulled up the hood of his sweatshirt and Ramon put on a ski mask. They agreed that Pole would hold the gun on the Disciples while Ramon searched their pockets and took their jewelry. Pole asked Ramon to take the safety off the gun, and Ramon complied. Pole told ASA Biesty that he "popped a round off" at the Disciples and that he and Ramon then fled. Pole said that he returned to his car with Andrea, told her he had "popped" some Disciples, and asked her to hide the gun and glove. Pole signed each page of the statement and also initialed a change in the spelling of Ramon's name.

Ramon pled guilty to murder and attempted armed robbery, but Pole went to trial. Pole's attorney moved to suppress any oral or written statements that Pole made the night he was arrested, claiming that he was not read his rights prior to interrogation, that his statements were not made knowingly or voluntarily, that his lengthy interrogation continued after he invoked his right to remain silent and his right to an attorney, that his statements were the result of physical and

psychological coercion, that his statements were provoked by confronting him with evidence obtained in violation of the Fourth Amendment, and that authorities lied to Pole in violation of the Fifth and Fourteenth Amendments. Counsel sought and obtained a hearing on the motion to suppress. At the hearing, the State presented testimony from the police officers involved in Pole's arrest and interrogation, and ASA Tom Biesty, all of whom refuted Pole's allegations. Pole's attorney did not call Pole as a witness and presented no evidence at the hearing, relying entirely on cross-examinations of the state's witnesses to make his case. He argued that Pole was only eighteen years of age at the time of the interrogation, had limited education, had never been interrogated before, was in custody for many hours before he signed the confession and did not give the statement voluntarily. The court found that the state's witnesses were credible, that Pole had been apprised of his rights prior to interrogation and that there was no evidence of coercion. The court denied the motion to suppress.

At the trial, Andrea Hamilton testified consistently with her signed statement. Karen Wills testified that she had encountered Pole and Andrea when she was walking home on the day of the murder. She went with them to retrieve Pole's car. When they arrived at the car, she saw Pole give Andrea a black, metal object, and heard him ask Andrea to "put it up" for him. After dropping off Andrea at her home, Pole told Karen Wills he had "gotten into it" with some Disciples and that he had

shot at them. Wills testified that shortly thereafter, she and Pole were stopped by the police. After Wills told the officers she had seen Pole give something to Andrea, the police officers drove the pair to Andrea's house. The officers later emerged from the house with all three Hamiltons.

Pole's written confession was entered into evidence, and the officers and ASA Biesty testified about Pole's oral and written admissions made within hours of the murder. A forensic investigator for the police department testified that no physical evidence was found at the scene, a gunshot residue test of Pole's hands was taken but he did not know the result, and no bullet had been recovered because it had passed through the victim's body, exiting his chest. One of the officers testified that he found a shell casing matching the gun in the grass near the scene. Pole's attorney argued to the jury that the shooting was accidental, that no robbery was intended and no steps had been taken towards a robbery, and that the gun had discharged unexpectedly while the safety was being manipulated. The attorney successfully argued over the prosecution's objection that the jury should be instructed on involuntary manslaughter as an alternative to murder. This was not a small victory given that Pole was charged with murder and attempted armed robbery, allowing the state to argue that he either intentionally shot at the Disciples or that Bernard Jackson was killed in the course of another felony. Under the felony murder theory, Pole's argument that he did not intentionally

shoot at Bernard Jackson would not have entitled him to an involuntary manslaughter instruction unless there was some evidence that he did not intend to commit robbery together with evidence that the shooting was accidental. Except for Pole's initial statement to the police, there was no evidence in the record supporting an involuntary manslaughter charge. The court called it a close issue, but gave Pole the benefit of the doubt and issued the involuntary manslaughter instruction. Perhaps because Pole had confessed to at least five different people within twelve hours of the murder and had signed a written statement detailing his actions that night, the jury had little trouble returning a verdict finding him guilty of murder and attempted armed robbery.

When the ink was barely dry on the verdict form, Pole began complaining at his sentencing hearing that he did not commit the crime, that his attorney failed to place into evidence reports that no gunshot residue was found on his hands or his glove, that he had wished to testify but had deferred to his lawyer's judgment out of fear, and that he had been manipulated and coerced into signing a confession. He claimed he had been led to believe that the state's attorney was there to help him, and that he was young, inexperienced and exhausted when he signed the confession. The court rejected Pole's claim of innocence and sentenced him to forty-four years of imprisonment on the murder charge and fifteen years on the attempted armed robbery conviction, to be served concurrently.

II.

In his direct appeal, Pole argued that the trial court failed to adequately inquire into his post-trial complaint that his lawyer had failed to call a witness with exculpatory evidence. He also contended that the trial court had erred in allowing the jury to hear evidence regarding Pole's membership in a street gang. The exculpatory evidence, Pole explained, consisted of two favorable gunshot residue tests. Pole contended that the swabs of his hands and tests of the glove were negative for gunshot residue, and that the trial court should have conducted an inquiry into his charge at sentencing that his attorney failed to put into evidence the negative gunshot residue test reports. Pole did not submit those reports with his appeal. The appellate court noted that Pole had not adequately raised the issue of ineffective assistance of counsel because he did not request new counsel and filed no *pro se* post-trial motion. The court nevertheless considered the merits of Pole's claim, and determined that counsel's strategy was to inform the jury that the gunshot residue test was conducted but that the prosecutor had not presented the results, leaving the jury to infer the reports would have been favorable to Pole. The appellate court continued that even if the attorney erred in not going farther with this evidence or the trial court erred in not pursuing Pole's allegation about his lawyer, there was no reasonable probability that the outcome of the trial would have been any different had this evidence been admitted. The court noted that the gunshot residue tests held little evidentiary value in

light of Pole's signed confession and the other ample evidence against him. Because the court did not know the test results for Pole's hands or the glove, and because the other evidence of his guilt was overwhelming, the court concluded that Pole had failed to show prejudice from the alleged errors.

Addressing Pole's claim that the court erred in admitting evidence of his gang membership, the appellate court found that this evidence was highly relevant to the crime charged because the shooting was alleged to be motivated by gang rivalry. One of the three men in the red van had been wearing the colors of the Gangster Disciples, and Pole had asked Larue about the men's gang affiliation shortly before the shooting. Moreover, Pole had confessed to a police officer that he went to confront the Disciples because the Blackstones considered him a "pigeon" or a "white boy" and he wanted to prove himself to his fellow gang members. Finally, the court rejected Pole's argument about the gang affiliation evidence because the state had used the evidence only for proper purposes throughout the trial. The appellate court therefore affirmed Pole's conviction. The Illinois Supreme Court declined to hear Pole's case on direct appeal.

Pole then filed a *pro se* petition for post-conviction relief in the state court, citing three grounds for relief. First, he contended that his trial attorney was ineffective for failing to present witnesses at the hearing on the motion to suppress and for not allowing Pole himself to testify at the motion to suppress. Second, he argued that his trial counsel

was ineffective because he failed to investigate exculpatory witnesses and eyewitnesses to the crime, and did not allow Pole to testify in his own defense. Third, he claimed that his appellate counsel was also ineffective for failing to raise in his direct appeal the issues he was now raising in his post-conviction petition. He filed numerous statements in support of his post-conviction petition including three affidavits of his own (R. 13, at C51, C57 and C61), an affidavit from Andrea Hamilton (R. 13, at C72), an affidavit from Ramon Hamilton (R. 13, at C63),[2] an affidavit from Bonnie Hamilton (R. 13, at C78), and statements from his mother (R. 13, at C83), sister (R. 13, at C84 and C85), and a fellow inmate (R. 13, at C81) supporting his requests for relief. The circuit court dismissed the petition without an evidentiary hearing and Pole appealed.

The Illinois Appellate Court took up Pole's case for a second time. In response to the state's argument that Pole had waived the arguments he was now raising, the court relaxed the rule for waiver because Pole claimed ineffective assistance both at trial and on appeal. The court therefore decided to address Pole's arguments on their merits. On the ineffective assistance claim based on counsel's performance at the suppression hearing, the appellate court reviewed the hearing transcript and determined that the claim was without merit.

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[2] Like Pole, Ramon signed a confession in the early morning hours of September 28, 1994, fewer than twelve hours after the murder. Ramon executed his affidavit more than four years later, in November 1998.

Specifically, the court noted that defense counsel's strategy was to paint his client as so young, inexperienced and naive about the justice system that his confession was involuntary. To that end, he cross-examined the state's witnesses and argued his position to the court. The court found that counsel's conduct was not substandard.

In addressing Pole's claim that his trial lawyer failed to investigate the case by failing to locate and call two eyewitnesses, Ramon Hamilton and Lontray, the court opined that there was no factual basis to support the claim. The court concluded (erroneously, as it turns out) that Ramon's affidavit indicated that Ramon was not present when the fatal shot was fired. Pole had not submitted an affidavit from Lontray. Because Ramon and Lontray could not have provided testimony that would have changed the outcome of the trial, the court found the argument without merit. The court therefore affirmed the dismissal of the post-conviction petition, and the Illinois Supreme Court again declined to hear the appeal.

Pole then brought his case to federal court, seeking *habeas corpus* relief based on ineffective assistance of counsel. Pole listed two specific instances of ineffective assistance of trial counsel: (1) counsel's refusal to allow Pole to testify at the hearing on the motion to suppress; and (2) counsel's failure to adequately investigate his case. Pole contended that the motion to suppress was critical to his case because a signed, written statement implicating him in the shooting was the state's best

evidence. Indeed, Pole argued, the prosecution had no physical evidence linking him to the crime and presented no eyewitnesses who could identify the shooter. Moreover, there was no real down side to Pole testifying, and no chance of winning the motion without Pole's testimony. Only he could have provided evidence that he was tricked into signing the confession because he was extremely tired and high on marijuana, according to Pole. He also argued that there was no strategic reason for the failure to call him as a witness at the suppression hearing. In explaining counsel's inadequate investigation, Pole noted that the affidavits he supplied constituted new evidence that corroborated his account of the shooting and undercut the state's theory. The new evidence, according to Pole, consisted of recantations of testimony of two of the state's witnesses. Finally, Pole argued that his appellate lawyer should have raised the ineffective assistance of counsel issue in his direct appeal.

The district court denied Pole's *habeas* petition without a hearing. The court adopted the factual findings of the Illinois appellate court in its unpublished order deciding the direct appeal. The court began by considering whether Pole had adequately presented his federal claims to the state courts because any claim not presented to the state's highest court is deemed procedurally defaulted. The court also noted that a federal court on *habeas* review could not consider claims that a state court had decided on state law grounds that were independent of the federal question and adequate to

support the judgment. The court noted as an example of this rule the issue of waiver, which is considered an independent and adequate state law ground that bars *habeas* relief. The court also noted, however, that waiver bars federal review only when the last state court to consider the question actually relied on procedural default as the basis for its decision. Turning to Pole's claim of ineffective assistance of counsel, the court found that Pole raised these issues in his direct appeal, that the Illinois Appellate Court's decision was based on independent state grounds adequate to support the judgment, and that the issues were therefore procedurally barred under 28 U.S.C. § 2254.[3]

The court nonetheless considered the issues on their merits. The court rejected Pole's claim that his attorney was deficient for failing to call him as a witness at the critical suppression hearing, instead relying on the state's witnesses. According to Pole, it was unreasonable to expect the state's witnesses to support Pole's version of events. But the court declined to second-guess counsel's strategic decision

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[3] This finding is puzzling because the only issues Pole raised in his direct appeal were related to the failure of his attorney to bring in evidence of the favorable gunshot residue tests and the trial court's decision to allow evidence of his gang affiliation. Perhaps the district court meant to refer to the Illinois Appellate Court's decision on the appeal of the dismissal of Pole's post-conviction petition, where Pole did raise many of the issues he raises here. However, the Illinois Appellate Court expressly declined in that decision to apply waiver to Pole's claims, and therefore the decision was not based on independent state grounds adequate to support the conviction.

to rely on cross-examination and not present Pole as a witness. As for Pole's complaint that trial counsel failed to investigate his case, the district court found the supporting affidavits insufficient. Repeating the error that the Illinois Appellate Court made in deciding the post-conviction appeal, the district court found that Ramon's affidavit indicated he was not present at the time of the shooting, and that information supplied by Ramon would not have changed the outcome of the trial, negating any claim of ineffective assistance. Finally, because the district court had already concluded that trial counsel was not ineffective, the court also rejected Pole's claim that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. The court therefore denied Pole's petition.

Within ten days, Pole filed a *pro se* motion for reconsideration, again claiming ineffective assistance of counsel. While that motion was pending, Pole filed a notice of appeal from the court's order denying his petition. He also requested a certificate of appealability from the district court. The court granted the certificate of appealability and then dismissed the motion to reconsider. The court found that it lacked jurisdiction over the motion to reconsider because it was an unauthorized attempt to litigate a successive collateral attack on his sentence without the permission of the court of appeals. Pole then filed an amended notice of appeal that added the denial of the motion to reconsider, and requested that this court grant a certificate of appealability with respect to that claim. In an Order

issued on January 18, 2007, we found that the district court erred in characterizing the motion to reconsider as a successive *habeas* petition. We held that the district court should have treated the motion as a timely filed motion for reconsideration and decided it on the merits. We therefore amended the certificate of appealability granted by the district court to include the denial of the motion for reconsideration and consolidated his appeal of the denial of the motion to reconsider with his original appeal of the denial of his petition. *See generally Pole v. Firkus,* Case Nos. 06-2768 & 06-3281, Order (7th Cir. Jan. 18, 2007). We now consider Pole's appeals.

III.

On appeal, Pole contends that he is entitled to *habeas* relief because his lawyer's assistance did not satisfy constitutional minimums. Pole now cites five instances of counsel's errors: (1) the failure to introduce the results of the gunshot residue tests; (2) the failure to interview or call Ramon Hamilton, an eyewitness whose testimony would have exonerated Pole; (3) the failure to interview key prosecution witnesses; (4) the failure to interview or call other identified eyewitnesses; and (5) the failure to call Pole to testify at the suppression hearing. Pole also maintains that the district court erred in concluding that his entitlement to *habeas* relief is procedurally barred. The state counters that Pole forfeited any argument that the state court unreasonably interpreted Ramon Hamilton's affidavit. Moreover, the state adds, Pole's *habeas* petition argued only

two operative facts in support of his ineffective assistance claim, forfeiting or procedurally defaulting all others including his contention about counsel's failure to present the gunshot residue evidence. Addressing Pole's remaining claims for ineffective assistance individually and as a whole, the state posits that Pole has not met his burden of demonstrating that counsel's performance fell below constitutional minimums.

A.

We must begin by sorting out the appropriate standards of review and whether certain claims have been waived or procedurally defaulted. Our review of the district court's decision to deny Pole's *habeas* petition is *de novo,* and is governed by the terms of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Mack v. McCann,* 530 F.3d 523, 533 (7th Cir. 2008); *Julian v. Bartley,* 495 F.3d 487, 491-92 (7th Cir. 2007). *See also Jackson v. Frank,* 348 F.3d 658, 661 (7th Cir. 2003); 28 U.S.C. § 2254. "Habeas relief must not be granted unless the state court's adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Julian,* 495 F.3d at 492. *See also Jackson,* 348 F.3d at 662; 28 U.S.C. § 2254(d). "In assessing the reasonableness of the state court's decision, the federal court assumes that the state

court's factual determinations are correct unless the defendant rebuts them with clear and convincing evidence." *Julian,* 495 F.3d at 492. *See also* 28 U.S.C. § 2254(e)(1).

The Supreme Court set forth the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins,* 539 U.S. at 521, 123 S. Ct. 2527 (citing *Strickland,* 466 U.S. at 687, 104 S. Ct. 2052). To demonstrate that counsel's performance was deficient, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052; *Wiggins,* 539 U.S. at 521, 123 S. Ct. 2527. That objective standard of reasonableness, in turn, is determined by prevailing professional norms. *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052; *Wiggins,* 539 U.S. at 521, 123 S. Ct. 2527.

To demonstrate prejudice from counsel's deficient performance, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052. If a defendant is unable to make a sufficient showing on either component of the *Strickland*

standard, we need not consider the other component. *Strickland,* 466 U.S. at 697, 104 S. Ct. 2052. *See also Pearson v. Callahan,* --- U.S. ----, 129 S. Ct. 808, 821, 172 L. Ed. 2d 565 (2009) (reaffirming the holding of *Strickland* that leaves to the sound discretion of the lower courts to determine the order of deciding the two components).

"[I]neffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed." *Peoples v. United States,* 403 F.3d 844, 848 (7th Cir. 2005). We assess counsel's work as a whole, and "it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief." *Id.* Under Section 2254's exhaustion requirement, the petitioner must assert his federal claim through one complete round of state-court review, either on direct appeal or in post-conviction proceedings. *See* § 2254(b)(1)(A); *Stevens v. McBride,* 489 F.3d 883, 894 (7th Cir. 2007), *cert. denied,* --- U.S. ----, 128 S. Ct. 2429, 171 L. Ed. 2d 257 (2008); *Lewis v. Sternes,* 390 F.3d 1019, 1025 (7th Cir. 2004). Adequate presentation of a claim to the state courts requires the petitioner to present both the operative facts and the legal principles that control each claim. *Stevens,* 489 F.3d at 894. *See also Thompson v. Battaglia,* 458 F.3d 614, 616 (7th Cir. 2006) (noting that the Rules Governing Section 2254 Cases in the United States District Courts require a petitioner to specify all grounds of relief available to him and the facts supporting each ground). Thus, if a petitioner fails to assert in the state courts a particular factual basis

for the claim of ineffective assistance, that particular factual basis may be considered defaulted. *Stevens*, 489 F.3d at 894 ("the failure to alert the state court to a complaint about one aspect of counsel's assistance will lead to procedural default").

1.

Acknowledging these familiar standards, the state asserts there is a "wrinkle" in determining the correct standard of review here. The state notes Pole's argument that both the state appellate court and the district court described Ramon Hamilton's affidavit inaccurately, and that, according to Pole, this was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under § 2254(d)(2). Although conceding that both courts did, in fact, read the affidavit incorrectly, the state argues that Pole forfeited any claim under § 2254(d)(2) regarding Ramon's affidavit by failing to preserve it in the district court. The state further maintains that, even if Pole adequately preserved the issue in the district court, we should nevertheless apply § 2254(d)(1) deference to the portions of the state court analysis that were unaffected by the state appellate court's factual findings regarding Ramon Hamilton's affidavit.

We consider the claim of forfeiture first. Looking to Pole's pleadings in the district court, we note first that, in his *habeas* petition, Pole correctly described Ramon's affidavit in detail and attached it to his petition. R. 1-1. In his brief on the *habeas* petition, he argued that the state court "erroneously

concluded that Ramon's affidavit did not place him at the scene." R. 31, at 14. After quoting Ramon's affidavit to illustrate the state court's error, Pole's counsel argued that this "gross misrepresentation of the contents" of Ramon's affidavit, in combination with the other affidavits submitted, proved that the state court unreasonably applied the facts. Later, when it became apparent that the district court had nonetheless made the same mistake as the state appellate court, Pole again pointed out the error in his motion for reconsideration. We find that Pole adequately preserved for review his claim under § 2254(d)(2) that the state appellate court misread Ramon's affidavit, and its decision was thus based, at least in part, on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

As we noted, both the state and district courts concluded from the affidavit that Ramon was not present at the shooting. That conclusion was inexplicable. Ramon stated in the affidavit that he brought the gun to the confrontation and that it discharged as he and Lontray both tried to take the gun from Thaddeus in order to set the safety. R. 13, at C63, ¶¶ 11-15. By every account of the crime, including the state's version, Ramon was present at the shooting. Indeed, Ramon pled guilty to the same murder and attempted armed robbery charges that Pole faced. Pole has thus clearly and convincingly rebutted the determination that Ramon was not present at the shooting. The question now is what effect that error has on our review of Pole's claims in

general. The state posits that, even if Pole preserved that claim, and we find that he did, § 2254(d)(1) deference should still apply to any part of the state court's analysis that was not affected by that error. Pole does not argue otherwise.

In *Wiggins,* the Supreme Court analyzed a *habeas* claim based on ineffective assistance of counsel where the state court made a similar factual error in its analysis of Wiggins' claim. 539 U.S. at 528, 123 S. Ct. 2527. Wiggins' lawyer claimed to have been aware of severe sexual abuse his client suffered as a child, citing two documents the lawyer possessed. The lawyer claimed that, based on the information contained in these documents, he made an informed and reasoned decision not to pursue the history of abuse further or present it to the jury in mitigation at sentencing. As the state conceded on appeal, however, neither document contained any information about the sexual abuse Wiggins suffered as a child. The Supreme Court stated:

> The state court's assumption that the records documented instances of this abuse has been shown to be incorrect by "clear and convincing evidence," 28 U.S.C. § 2254(e)(1), and reflects "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision.

Wiggins, 539 U.S. at 528, 123 S. Ct. 2527. The *Wiggins* Court had other grounds for finding counsel's performance deficient but clearly used this single factual error to support its conclusion that the state court's decision was unreasonable under the standards of § 2254. We will therefore consider the factual error regarding Ramon's affidavit in combination with his other claims in determining whether the state court unreasonably applied *Strickland* to the facts here. *See Wiggins*, 539 U.S. at 520, 123 S. Ct. 2527 ("We have made clear that the 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of petitioner's case.").

2.

Oddly, the state concedes in one part of its brief that the gunshot residue claim was fairly presented to and adjudicated by the state appellate court (Brief of Respondent-Appellee, at 24, (7th Cir. Apr. 25, 2007) (hereafter "State's Brief")), but then later argues that Pole procedurally defaulted the gunshot residue claim in the state court (State's Brief at 32-33). Fair presentment of an issue requires a petitioner to put forward both the operative facts and the controlling legal principles. *Sanders v. Cotton*, 398 F.3d 572, 580 (7th Cir. 2005). *See also Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) ("ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court

must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so."). According to the state, the state court held that Pole did not adequately raise the issue of trial counsel's ineffectiveness for failing to present the gunshot residue results. R. 1-1, Appx. 1, at A-9. On direct appeal, the state court indeed said that Pole had not adequately raised the issue of ineffective assistance related to the gunshot residue evidence, but the court then nonetheless addressed that claim on the merits. The court found that counsel was not ineffective because he placed before the jury the fact that the residue test had been taken and that the prosecution had not put the results into evidence. The state court found it was a reasonable strategy to imply to the jury that the results favored Pole. Because counsel on appeal also did not submit the results of the gunshot residue test to the state appellate court, that court also found that Pole failed to show prejudice from counsel's failure to place the actual test results before the jury.

Similarly, in post-conviction proceedings, the state appellate court refused to treat the claim of ineffective assistance of trial counsel as waived because Pole had also alleged ineffective assistance of appellate counsel. The state post-conviction court thus addressed Pole's claim of ineffective assistance on the merits, expressly finding that, under these circumstances, "strict application of waiver should be relaxed to give defendant a fair opportunity to

present his argument." *People v. Pole,* No. 1-99-0858, at 4, 2001 WL 34149729 (Ill. App. 1 Dist. April 13, 2001). That Pole may have failed to abide by a state procedural rule does not necessarily preclude this court from hearing his claim. *See Harris v. Reed,* 489 U.S. 255, 262, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) ("a federal claimant's procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default."). "[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi,* 472 U.S. 320, 327, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). *See also Harris,* 489 U.S. at 261-62, 109 S. Ct. 1038. The Supreme Court also set a "plain statement" rule to govern the analysis of whether the state court rested its judgment on a procedural default: "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris,* 489 U.S. at 263, 109 S. Ct. 1038 (quoting *Caldwell,* 472 U.S. at 327, 105 S. Ct. 2633). *See also Smith v. Battaglia,* 415 F.3d 649, 653 (7th Cir. 2005) (same); *Sanders v. Cotton,* 398 F.3d 572, 580 (7th Cir. 2005) (where the state appellate court's discussion of waiver is intertwined with its merits analysis, the state court's decision does not rest on an independent and adequate state law ground). The state can point to no such statement here, and indeed the last state court to

consider the gunshot residue issue expressly declined to rest on a procedural bar and instead decided the issue on the merits. We therefore decline to find that the claim was procedurally defaulted in the state court.

But the state is correct that Pole did not argue, in either his *habeas* petition or his brief in the district court, the issue of his lawyer's failure to present the gunshot residue test, and therefore forfeited it in federal proceedings. *See Martin v. Evans*, 384 F.3d 848, 853 (7th Cir. 2004) (a defendant who fails to present a specific ground of trial counsel's ineffectiveness in the district court has waived the issue). *See also Stevens*, 489 F.3d at 894 (the failure to alert a state court to a complaint about one aspect of counsel's assistance will lead to a procedural default), *Peoples*, 403 F.3d at 848 ("one who makes and loses a contention that counsel was ineffective for four reasons cannot start over by choosing four different (or four additional) failings to emphasize"). A party may not raise an issue for the first time on appeal. *Domka v. Portage County, Wisconsin*, 523 F.3d 776, 783 (7th Cir. 2008) (where a party raises a specific argument for the first time on appeal, it is waived even though the "general issue" was before the district court). Pole claims that his filings in the district court were replete with references to his lawyer's failure to raise the results of the gunshot residue tests. Simply referring to the gunshot residue test, of course, is not enough to preserve the ineffectiveness issue for review in this court. *Kunz v. DeFelice*, 538 F.3d 667, 681 (7th Cir. 2008) (failure

adequately to present an issue to the district court waives the issue on appeal).

Pole details his references to the gunshot residue test in the district court in his reply brief on appeal. We recount them here to demonstrate why we find the issue forfeited. First, Pole states that the issue was raised in the state appellate court's decision on direct appeal and that the state court's decision, in turn, was "discussed" in his federal *habeas* petition. In the *habeas* petition, Pole complained that the state appellate court, in ruling on his direct appeal, faulted him for failing to file a post-trial motion claiming ineffective assistance, failing to request appointment of new counsel, and making only a general statement regarding the evidence he believed should have been presented at trial. Pole then noted, "However, the evidence Petitioner referred to was a ballistics report that conclusively shows that no gunshot residue was found on the gloves he allegedly was wearing when the fatal shot allegedly was fired." R. 1-1, at ¶ 72. This passage in the *habeas* petition merely recounted the state court's ruling on direct appeal. But simply rehashing another court's ruling on the subject, without supplying supporting facts and legal argument, is not enough to alert the district court that he was raising this issue as a basis for his claim of ineffective assistance. *See Winsett v. Washington*, 130 F.3d 269, 273-74 (7th Cir. 1997) (where the only reference to the voluntariness of a confession in a *habeas* petition is a recapitulation of the state trial court's ruling on the subject without facts or legal

arguments in support of a claim of involuntariness, the claim is waived). Second, in his *habeas* brief, Pole notes that he filed affidavits in support of his post-conviction petition, detailing what happened on the night of the shooting. He recounts information from one of those affidavits: "Petitioner was arrested later that night and taken to a police station, where the police checked his hands for gun-shot residue. The test proved negative." R. 31, at 7. But Pole utterly failed in the *habeas* brief to develop any legal argument that his lawyer's failure to put those results into evidence constituted ineffective assistance. These two mentions of the gunshot residue test were the only references Pole made in the district court before the court denied his petition.

After the district court ruled against him, Pole alluded to the gunshot residue test a third time, in his *pro se* motion for reconsideration. R. 41. There, for the first time in federal proceedings, he argued that if his attorney had presented the scientist who conducted the test and the results of the test, he would have been able to prove he was not the shooter. In the motion for reconsideration, Pole posited that the gunshot residue test would also have shown that his signed confession was untrue and coerced. He also argued that Ramon's affidavit would have explained why the gunshot residue tests were negative, namely because Pole was not touching the gun when it accidentally discharged. Pole attached the gunshot residue report to his motion for reconsideration before the district court. This third reference to the gunshot residue tests

came too late, however, to preserve the issue for appeal. Arguments raised or developed for the first time in a motion to reconsider are generally deemed forfeited. *Mungo v. Taylor,* 355 F.3d 969, 978 (7th Cir. 2004). In a fourth reference, Pole argued in his reply brief on the motion to reconsider that the gunshot residue evidence would have shown that it was impossible for him to have fired the fatal shot.[4] R. 56. Again, arguments raised in a motion to reconsider are generally deemed forfeited. *Mungo,* 355 F.3d at 978. In a fifth reference, Pole repeated the argument from his *pro se* reply brief in his *pro se* notice of appeal, again too late. R. 42. And sixth (and finally), in his *pro se* briefing on his request for a certificate of appealability, Pole stated, "it is further highlighted that Petitioner did not fire a gun that night because short [sic] after the shooting his hands and alleged glove were tested for gunshot residue. Both test [sic] yielded negative." R. 74, at 5. This reference also is too late to raise the issue, and in

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[4] Based on our review of the record, Pole has never presented any evidence that the absence of gunshot residue demonstrates with any certainty that he was not holding the gun when the fatal shot was fired. He has presented no evidence, expert or otherwise, interpreting the results of the gunshot residue tests. We therefore cannot say whether the test was conclusive on the issue of whether he was holding the gun when it discharged, or whether, for example, he could have washed off any residue in the time between the crime and his arrest. On this record, we simply do not know the value of this evidence. Indeed, on direct appeal, the Illinois Court of Appeals commented, "The absence of gunshot residue does not mean that the person tested did not handle or fire the weapon." *People v. Pole,* Case No. 1-96-1030, at 11, 1997 WL 1168335 (Ill. App. 1 Dist. Dec. 22, 1997).

any case, in this final instance, Pole mentions the gunshot residue test only in the context of bolstering the importance of Ramon Hamilton's affidavit and potential testimony.

Only the first two references came before the district court ruled on the petition for *habeas* relief. Neither of those references contained anything resembling an argument that counsel was ineffective for failing to present the gunshot residue evidence at trial. In the *habeas* petition itself, Pole listed only three bases for his claim of ineffective assistance: (1) the failure to call Pole as a witness at the motion to suppress; (2) the failure to adequately investigate the case which led to the failure to secure the recantations and other affidavits corroborating Pole's account of the incident; and (3) the failure of appellate counsel to raise ineffective assistance by trial counsel. Nowhere in his *habeas* petition or brief did he develop a legal argument that his lawyer was ineffective for failing to introduce the results of the gunshot residue test. All other references came too late in motions to reconsider and subsequent pleadings when Pole could have raised the arguments earlier. Pole offers no justification for failing to develop the argument earlier in the federal proceedings. The issue is thus forfeited. *Winsett,* 130 F.3d at 274 (appellate court may not consider a *habeas* argument that was not presented to the district court).

3.

The state agrees that two of Pole's ineffective assistance claims were fairly presented to and adjudicated on the merits by the state appellate court, and that those claims were not procedurally defaulted. According to the state, Pole properly preserved claims that counsel was ineffective (1) for failing to call Pole as a witness at his suppression hearing; and (2) for failing to investigate Ramon Hamilton and Lontray. State's Brief at 24, 50. The state concedes that the district court erred in finding a "complete procedural default." We therefore will address those claims on the merits below. The state contends that Pole forfeited the other claims he now raises on appeal because he failed to raise those claims in the district court. In particular, the state maintains that Pole did not argue in the district court that counsel was ineffective when he failed to interview key prosecution witnesses (Andrea and Bonnie Hamilton and Karen Wills) and failed to interview or call other identified eyewitnesses (Thaddeus and Thomas, Jr.). Having reviewed Pole's pleadings in the state courts and district court, we find that Pole adequately raised both the legal and factual bases for the claims related to the prosecution witnesses. In both the state courts and the district court, he attached the affidavits that formed the basis of these claims. Pole did not, however, argue in his *habeas* brief in the district court that counsel was ineffective for failing to investigate Thaddeus and Thomas Jr., the putative additional eyewitnesses to the crime, and therefore

that claim is forfeited because it is presented for the first time on appeal. *Winsett,* 130 F.3d at 274. In sum, we will address on the merits Pole's claims that trial counsel was ineffective in (1) failing to call Pole as a witness at the suppression hearing; (2) failing to investigate Ramon Hamilton; and (3) failing to interview the prosecution witnesses (Andrea and Bonnie Hamilton and Karen Wills), who, in part, later recanted their testimony.

B.

As we noted above, in order to make out a claim for ineffective assistance, a petitioner must show both that his lawyer's performance fell below an objective standard of reasonableness as measured by prevailing professional norms, and also that the petitioner suffered prejudice as a result of counsel's errors. *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052; *Wiggins,* 539 U.S. at 521, 123 S. Ct. 2527. When we are reviewing a *Strickland* claim through the lens of the AEDPA, in order to prevail, the petitioner must demonstrate that the state court's adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

1.

We turn first to trial counsel's failure to call Pole as a witness at the suppression hearing. Counsel failed to call any witnesses at the suppression hearing, instead relying on his cross-examination of prosecution witnesses to make his case. The state called two police officers and the state's attorney, each of whom interviewed Pole in the hours following his arrest. They testified that Pole was advised of his rights and not mistreated in any manner, that he read and understood the confession written out by the state's attorney, and that he appeared capable of understanding what was happening. Pole's lawyer argued to the state trial court that, at the time of the interrogation, Pole was eighteen and had a limited education. This was the first time he had been interrogated, and he lacked experience with the criminal justice system. Pole's counsel also argued that he was held for a lengthy time before he confessed, and that under the totality of the circumstances, his statement was not voluntary.

In his affidavits, Pole claims that, had he been called to testify at the suppression hearing, he would have told the court that the officers chained him to the wall of the interrogation room. R. 13, at C51, C57 and C61. Two officers gave him a snack and a drink and asked him if he knew about the shooting at the gas station. When Pole told the officers that the shooting was accidental, one of the officers took back the snack and drink and called him a liar. The other officer took him to another room and handcuffed him to the wall again. Pole was tired and had difficulty

getting into a position where he could sleep because he was handcuffed to the wall. On two or three occasions, when he started to fall asleep, officers came back into the room, woke him up, and asked more questions. According to his affidavits, at the time of his interrogation, Pole had been awake for twenty-four to thirty hours, and had been selling narcotics, smoking marijuana, and drinking rum in the hours before his arrest. Pole would have testified that he was not in a "normal frame of mind," and that he told the officers he was tired and needed sleep. R. 13, at C59. Eventually, according to Pole, the state's attorney told him that, in order to save himself, he should sign a paper saying that Ramon was the shooter. Pole signed the paper without reading it in the hopes of "getting it over." R. 13, at C55.

We begin with the presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Thompson v. Battaglia*, 458 F.3d 614, 620 (7th Cir. 2006). To determine whether a confession is voluntary, the court looks at the characteristics of the defendant and the conduct of the interrogators to determine if the defendant's will was overcome by coercion. *Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir. 2007) (whether a confession was voluntary depends on the totality of the circumstances surrounding that confession, including both the characteristics of the accused and the details of the interrogation that resulted in the confession). A confession is voluntary if, considering

the totality of the circumstances, it is the product of a rational intellect and free will, and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will. *United States v. Gillaum,* 372 F.3d 848, 856 (7th Cir. 2004). *See also Johnson v. Pollard,* 559 F.3d 746, 753 (7th Cir. 2009) (a confession is involuntary when it was given in circumstances that were sufficient to overbear the confessor's free will). Moreover, coercive police activity is a necessary predicate to finding that a confession is not voluntary. *Colorado v. Connelly,* 479 U.S. 157, 163-64, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *Gillaum,* 372 F.3d at 856. Courts may consider, among other things, the age, experience, education, background and intelligence of the accused, the length of the questioning, and other circumstances surrounding the interrogation when evaluating whether a confession was voluntarily given. *Johnson,* 559 F.3d at 755. *See also Gillaum,* 372 F.3d at 856-57 (same).

The basis of Pole's claim of coercion is that his interrogators deprived him of sleep and lied to him at a time when he was mentally impaired by his consumption of marijuana and rum in the hours leading up to his arrest.[5] He signed the papers, he

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[5] We note that Pole's affidavit generally denies he made any oral statements incriminating himself, and the alleged coercive activity surrounds only his signed statement. The police officers and assistant state's attorney testified (and the trial court found their testimony credible) that Pole's first oral confession came within a few hours of his arrival at the police

contends, because he was told they implicated Ramon as the shooter. He did not tell the officers that he was under the influence of rum and marijuana but only that he was tired and needed to sleep.[6] He also does not claim that the officers threatened him or physically abused him in any other way. Pole's lawyer did not call any witnesses, but instead relied on cross-examination of the state's witnesses to support the motion to suppress. The state trial court found that the state's witnesses were credible, that Pole had been read his rights and that there was no evidence supporting his allegations of coercion. As we noted above, the state appellate court, in post-conviction proceedings, found that counsel's performance at the suppression hearing was not deficient. Specifically, the state appellate court found that counsel's strategy of cross-examining the state's witnesses and arguing Pole's youth and inexperience to the trial court was adequate.

We recently had the occasion to consider whether relying solely on a cross-examination of the state's witnesses to prove coercion fell within the range of competent legal representation. *See Bynum v.*

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station. Pole does not allege that the police officers lied to him during the earlier part of the evening, only that the assistant state's attorney misrepresented the contents of the signed statement much later. The signed statement was written at approximately 6:45 a.m. on September 28, 1994, nearly twelve hours after the murder.

[6] In Pole's signed confession, he claimed not to be under the influence of drugs or alcohol at the time of making his statement.

Lemmon, 560 F.3d 678 (7th Cir. 2009). Bynum told his lawyer that, during his interrogation, the police threatened him with violence when he asked for a lawyer, handcuffed him to a chair for nine hours, deprived him of food and water and refused to let him go to the bathroom, among other things. Bynum's lawyer moved to suppress his confession but did not ask Bynum to testify at the hearing. Instead, counsel questioned the officers who took Bynum's statement. The officers contradicted every part of Bynum's claim of coercion, and the trial court found the officers credible. Counsel later explained that he did not call Bynum to the stand because he did not think Bynum would hold up under cross-examination. We noted that Bynum's account of the interrogation was the only available evidence of coercion. We found that an expectation that the interrogating officers would admit on the stand that they used coercion to force Bynum's confession was more "television fantasy" than trial strategy. Any competent lawyer would have expected the interrogators to deny that they coerced a suspect. Without an admission to wrongdoing by the interrogators, Bynum was left with no evidence that his confession was coerced. Because a "motion to suppress allegedly involuntary confessions cannot succeed without at least some evidence that the confessions were coerced," and because counsel's reason for keeping Bynum off the stand was legally baseless, we concluded that counsel's actions fell well outside the range of competence demanded by attorneys in criminal cases. *Bynum,* 560 F.3d at 684. We held that the state court's conclusion to the

contrary was an unreasonable application of the *Strickland* standard. *Bynum,* 560 F.3d at 685.

Pole's case presents a similar situation. Counsel had only Pole's testimony that, at the time of his interrogation, he was obviously under the influence of drugs and alcohol, he had been awake for twenty-four to thirty hours, and the officers chained him to the wall in a manner that made it difficult to sleep and then woke him up every time he tried to fall asleep, even though he told the officers that he needed to sleep.[7] Moreover, only Pole could testify that when he signed the confession, he did so because the interrogators told him the confession implicated Ramon as the shooter and not himself. We do not know why Pole's counsel declined to call him to the stand because there has been no hearing on Pole's claim of ineffective assistance and Pole has submitted no affidavit from his trial counsel. Perhaps Pole's lawyer wished to avoid the possibility that Pole would be impeached at trial with any testimony he gave at a suppression hearing. *See People v. Sturgis,* 58 Ill. 2d 211, 317 N.E.2d 545, 548 (1974) ("We therefore hold that the testimony of a defendant or documents voluntarily attested to by him in conjunction with his motion to suppress evidence may not be introduced by the State directly

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[7] A defendant's mental state is not enough alone to render his confession involuntary for suppression purposes. *See Connelly,* 479 U.S. at 164-65, 107 S. Ct. 515. Although mental condition is relevant to a defendant's susceptibility to coercion, the police interrogator must have committed wrongful acts in order for a confession to be suppressed as the product of coercion.

in its case in chief but may be used for purposes of impeachment should the defendant choose to testify at trial."). Pole's lawyer may also have been concerned that the trial court would enhance Pole's sentence for obstruction of justice if Pole testified and the court disbelieved him. In Bynum's case, we had the benefit of a fully developed record, including testimony from Bynum's lawyer explaining why he attempted to prove coercion using only the prosecution witnesses. We found that counsel's performance was deficient because an attempt to prove coercion on the basis of the interrogators' testimony alone without a valid reason to do so was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S. Ct. 2052; *Bynum,* 560 F.3d at 685. Without knowing counsel's reasoning in this case, we will assume that counsel's performance was deficient and move on to the second part of the analysis.

Pole must still demonstrate, of course, that any error prejudiced him. *Strickland,* 466 U.S. at 693, 104 S. Ct. 2052; *Bynum,* 560 F.3d at 685. To succeed on the prejudice prong of *Strickland,* Pole must demonstrate that, had he testified, there was both a reasonable probability that he would have prevailed on the motion to suppress and a reasonable probability that he would have been acquitted. *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052; *Bynum,* 560 F.3d at 684. *See also Thompson,* 458 F.3d at 620 (a *habeas* petitioner claiming that a lawyer's failure to make a motion to suppress was ineffective must prove that the motion would have been meritorious).

Unlike *Bynum,* where the primary evidence against the defendant was the confession itself, we cannot assume that Pole would have been acquitted had the motion to suppress been granted; there was considerably more evidence against Pole than the signed confession. In addition to oral and written confessions to the police officers and state's attorney, Pole had confessed to Andrea Hamilton and Karen Wills, and was implicated by Ramon Hamilton as the shooter. Persons on the scene identified him as the individual who asked about three men in the van and who later drove by flashing gang signals. The police had also recovered the murder weapon along with a glove bearing Pole's name. In Pole's own version of events on the night of the murder (which we glean from the affidavits he has filed with his *habeas* petition), Pole concedes he called his fellow gang members to the scene, that the group had gone back to the tire shop to confront a member of a competing gang, and that he was present when the fatal shot was fired during the struggle to set the safety on the gun. Indeed, the only salient points on which Pole's story differs from the state's version are (1) whether the shot was fired accidentally by his compatriots at a time when he was not touching the gun, or whether Pole fired the shot deliberately; and (2) whether Pole and his fellow gang members were there to beat a gang rival or to rob him. The difference between Pole's version and the state's version of the shooting would be the difference between first degree murder and involuntary manslaughter if Pole had not also been convicted of attempted armed robbery, another felony arising out

of the same event. That is, if Bernard Jackson's death was the result of the attempted armed robbery, for the purposes of the Illinois felony murder statute, it would not matter whether Pole aimed deliberately or whether the gun accidentally discharged; in either case, Pole would be guilty of first degree murder. *See People v. Figueroa,* 381 Ill. App. 3d 828, 319 Ill. Dec. 692, 886 N.E.2d 455, 463 (1 Dist. 2008) (under the felony murder doctrine, a felon is responsible for the direct and foreseeable consequences of his actions, regardless of whether the defendant intended to kill the victim or whether the death was accidental); *People v. Pugh,* 261 Ill.App.3d 75, 199 Ill. Dec. 434, 634 N.E.2d 34, 35-36 (5 Dist. 1994) (felons are responsible for those deaths which occur during a felony and which are foreseeable consequences of their initial criminal acts; it is immaterial whether the killing was intentional or accidental or was committed by a confederate without the connivance of the defendant or even by a third party trying to prevent the commission of or resist the felony). Pole's confession implicated him in both the armed robbery and the murder, and so the suppression motion could have affected both convictions. Because Pole also alleges that the other evidence of his participation in the crime is suspect (in particular, the evidence from Andrea Hamilton, Karen Wills and Ramon Hamilton), we will defer the final analysis of whether the confession would have been suppressed or whether Pole would have been acquitted until we consider his other claims of ineffective assistance.

2.

As we have already noted, both the state appellate court and the district court misread Ramon Hamilton's affidavit. Each court assumed that Ramon was not present at the shooting and that his testimony therefore could not have influenced the outcome of the trial. In his affidavit and even in the state's version of the facts, Ramon was present at the shooting, and was the individual who brought the gun to the encounter. Indeed, Ramon was charged with and pled guilty to murder and attempted armed robbery, the same charges on which Pole was convicted at trial. In the course of pleading guilty, Ramon admitted to the prosecutor's proffered factual basis for his plea. According to that proffer, after Ramon was arrested on the night of the murder, he received *Miranda* warnings and, with his mother present (because Ramon was fifteen years old at the time), gave a statement implicating himself and Pole. According to that statement, Pole came to Ramon the evening of the murder to ask for a gun so that Pole could go to the tire shop and rob the Gangster Disciples of their jewelry. Ramon provided Pole with a loaded handgun, and drove in a separate car when the Blackstones passed in front of the tire shop to verify that Gangster Disciples were present. After parking their cars near the tire shop, Pole asked Ramon to release the safety on the gun and Ramon obliged. They approached the shop and Pole fired one shot before the two fled the scene. After being told that Pole gave the gun to Ramon's sister, Ramon retrieved the gun and hid it until the police arrived

and demanded the weapon. Ramon conceded all of this at his change of plea hearing.

In his affidavit, Ramon told a different story of the night of the murder. R. 13, at C63.[8] According to the affidavit, Ramon was at his home with Thomas Jr., Lontray, Rob and Thaddeus "smoking weed" when Pole drove up.[9] R. 13, at C63, ¶ 3. Pole told the group that a rival gang member, Corey Lamb, was at the tire shop. Thaddeus suggested that the group proceed to the tire shop to beat Lamb for a past wrong. After Rob balked, Thaddeus suggested that the group drive past the tire shop to make sure that Pole was correct about the identity of the man he saw there. They drove past the shop, confirmed Pole's claim, and then parked in the alley behind the shop. As they walked toward the tire shop, Thaddeus asked if everyone had his back, and Ramon offered that he had a gun. Thaddeus then took the gun from Ramon and said he was going to hit Lamb with the gun. Ramon and Lontray told him to put the safety on or to take the clip out to prevent an accidental shooting. While Thaddeus was trying to put the safety on, Ramon and Lontray reached for the gun and it discharged toward the van at the tire shop. Everyone ran, and Ramon returned home and

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[8] As previously noted, this affidavit was signed in 1998, more than four years after the murder. Pole submitted Ramon's affidavit to the Illinois appellate court with his *pro se* petition for post-conviction relief in November 1998, and also submitted it in his federal *habeas* proceedings.

[9] No last names have been offered by Pole or by any of his affiants for any of these individuals.

"fired up [his] blunt."[10] Thaddeus and Pole came to Ramon's house and Ramon asked where the gun was. When Pole told him it was in his car, Ramon told him to retrieve the weapon.

Pole left to get the gun, and Ramon proceeded to a "game room" with Lontray, where he played a few games and smoked more marijuana. When Ramon returned home, his sister Andrea gave him the gun and he hid it on the side of his house. When the police arrived and asked for the gun, Ramon (by his own account) "played crazy" and told the officers he did not know what they were talking about. After the officers starting "pulling and shaking" him, he turned over the gun. The officers then took Ramon, his sister and his mother to the police station for questioning. The police questioned Ramon with his mother present, telling him that Pole had named him as the shooter. When Ramon denied being the shooter, the officers told him that the only way for him to go home was to sign a statement implicating Pole as the shooter. Ramon refused to sign the statement until his mother directed him to do so. Contrary to the officer's promise, Ramon was not released, but was placed in custody at a juvenile facility. Ramon's lawyer later recommended that he accept a plea deal and testify against Pole. Ramon's mother told him to take the deal, and Ramon pled guilty. Ramon was never asked to testify against Pole. R. 13, at C63-66.

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[10] According to www. urban dictionary. com, a blunt is a cigar that has been hollowed out and refilled with marijuana.

According to Pole, Ramon's testimony, as portrayed in his affidavit, would have exonerated him. Pole claims that his lawyer's failure to investigate Ramon and call him to the stand constituted ineffective assistance of counsel. Ramon, Pole contends, was an eyewitness whose testimony could have shown that Pole was not the shooter. Similarly, Lontray was an eyewitness whose testimony could have exonerated Pole of the charge of first degree murder. Because the district court and the state court misconstrued the affidavit, we will review this claim without the usual deference. We first consider whether counsel's failure to investigate Ramon and Lontray was "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S. Ct. 2052. Ramon had signed a confession on the same night that Pole implicated himself, and Ramon's confession substantially matched the statements given by his sister Andrea and by her friend Karen Wills. Ramon also pled guilty to the murder and conceded the state's version of the facts at his plea allocution. That version, of course, named Pole as the shooter.

Pole's argument on this point presumes first that his trial counsel did not investigate Ramon Hamilton or Lontray. The record, however, does not tell us whether counsel in fact had investigated these two eyewitnesses to the crime prior to the time of the trial.[11] Pole did not obtain an affidavit from his trial counsel, and neither the state courts nor the district

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[11] Ramon's affidavit does not mention Pole's attorney. R. 13, at C63-C66.

court held a hearing at which the fact-finder could have discerned whether there was a factual basis for Pole's claim that counsel failed to investigate these witnesses. Moreover, Pole has submitted no affidavit from Lontray supporting his claim that Lontray's testimony would exonerate Pole. On appeal, Pole does not ask us to remand for a hearing but rather requests that we simply reverse the district court's order and remand with instructions to issue the writ. Given that it was Pole's burden to produce evidence on this point, and given that Pole has neither produced that evidence nor requested a hearing where he would have an opportunity to provide that evidence, we decline to assume the truth of assertions that lack record support.

Pole's argument also presumes that, had counsel investigated Ramon Hamilton, counsel would have been able to convince Ramon to recant his confession, withdraw his guilty plea (or at least recant his plea hearing allocution), and reverse his intention to cooperate with the state in Pole's prosecution. As for Lontray, Pole's argument presumes that counsel would have been able to locate the elusive Lontray (whose last name has yet to be provided), and would have been able to get Lontray to confess that it was he who was holding the gun and struggling with his cohorts when the weapon discharged. In other words, counsel would have had to persuade Lontray to confess to his part in the shooting death of Bernard Jackson. In the case of both Ramon and Lontray, nothing in the record supports the wild speculation that counsel would have been able to

convince Ramon to admit to perjury and Lontray to testify to the version of the facts now promoted by Pole and Ramon. Nor may we ignore the bizarre nature of the story Pole now promotes through Ramon, that gang members who concede they were on their way to confront and beat a rival gang member, stopped to argue about how best to protect the target of their wrath from an accidental shooting.[12] Reasonably competent counsel had every reason not to call Ramon to the stand. Ramon's guilty plea, his confession and his allocution all provided strong evidence against Pole. Ramon's earlier versions of events pointed to Pole as the instigator for the entire confrontation and as the ultimate trigger man. In light of the gaps in the record, Ramon's confession and guilty plea, and the utter lack of information regarding Lontray, we cannot say that counsel's possible failure to investigate or call these witnesses fell outside the wide range of professionally competent assistance. *Strickland,* 466 U.S. at 690, 104 S. Ct. 2052.

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[12] In the affidavits filed with the *habeas* petition, both Ramon and Pole concede that they went to the tire shop to "beat Corey's ass," in Ramon's words, and to "whip Corey's ass," in Pole's words. They also both conceded that after Ramon produced the gun, Thaddeus announced he was going to use the gun to pistol whip Corey, their gang rival. R. 13, at C51, ¶¶ 8, 14; R. 13, at C63, ¶¶ 5, 12. Only then did these unusually conscientious gang members begin to argue about how best to pistol whip Corey without actually shooting him.

3.

Pole's primary evidence that his lawyer failed to investigate Andrea and Bonnie Hamilton and Karen Wills comes in his third affidavit. R. 13, at C61. There he states that, after talking to Andrea and Karen before the trial, he asked his lawyer to investigate the two. His lawyer replied that a private investigator would cost about $250, a price Pole agreed to pay. According to the affidavit, Andrea told Pole before the trial that she and her mother signed statements implicating him only because the police told them they could go home if they did so. Andrea offered that if Pole sent his lawyer to meet them, Andrea and her mother would sign affidavits explaining why they signed the original statements. Andrea later refused to talk further to Pole, telling him she was going to testify for the state. According to Pole, his lawyer also told him that if Andrea and Karen were willing to sign affidavits changing their original stories, they would likely testify "to the exact same thing at trial on the stand." R. 13, at C61, ¶ 4. Pole believed that Andrea was trying to protect her brother Ramon when she withdrew her support from Pole.

Pole has not provided any affidavit from Karen Wills, stating only in his own affidavit that he spoke to Wills in May 1995, and that Wills related to him that "she did not want to sign the paper but she just wanted to go home that night, especially since the police knew she had stolen some hair care products. She further related that she meant me no harm she just signed the paper that she thinks the State's

Attorney had written up." R. 13, at C61, ¶¶ 1-2. Yet Pole has presented no evidence that Karen Wills ever recanted her statements from the night of the murder or her testimony at trial, both of which implicated Pole as the shooter. She states (through Pole) that she did not want to sign the statement and meant no harm to Pole but does not assert that she lied in her initial statements and testimony. Notably, neither the affiants (Pole, Bonnie and Andrea Hamilton) nor Karen Wills state that Pole's lawyer did *not* contact them or investigate their stories. Nor do any of them claim that the statements they signed on the night of the murder were untrue.[13] Rather, they now assert that they signed the statements because they wanted to go home, or because they wanted to protect themselves

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[13] Andrea Hamilton comes closest to saying that her original statement was untrue. In her affidavit, she alleges that the prosecutor told her to testify that Pole brought a gun to her house and that Pole told her he shot somebody. The prosecutor told her that she had to choose between her brother and Pole and "It's only natural I would chose Ramon." She also averred that she now felt "responsible for my brother Ramon and Willie [Pole] being locked up for something that they had nothing to do with." R. 13, at C72-C73. That Pole and Ramon had "nothing to do with" the shooting is a characterization of events belied by the affidavits of Pole and Ramon. Each now concedes that they went to the tire shop with a gun to attack a rival gang member, an action that led to the shooting death of an innocent bystander. They also both stated in their affidavits that Ramon directed Pole to bring the gun to Ramon's house, and that Pole did so by giving the gun to Andrea with directions to bring it home for Ramon. Her assertion that the prosecutor manufactured her statement is curious in light of her brother's concessions.

or Ramon. Each testified at trial consistently with their original statements. Bonnie Hamilton's affidavit does not add much to the mix. She averred that the prosecutor told her the only way for her and her children to go home was for Ramon to sign a statement saying that Pole shot at someone and for Andrea to sign a statement saying that Pole gave her the gun. Again, Pole himself concedes (as does Ramon Hamilton) that Pole gave the gun to Andrea after the shooting. Bonnie Hamilton does not aver that the prosecutor was asking Ramon to *falsely* claim that Pole shot at someone, only that the prosecutor asked Ramon to sign a statement to that effect. Bonnie Hamilton, like her daughter, now complains that Ramon is "locked up for a murder he did not commit," even though Ramon pled guilty to murder charges and agreed to the truth of the prosecutor's proffer at his plea allocution. R. 13, at C78-C80.

If in fact Pole's lawyer failed to investigate Andrea and Bonnie Hamilton and Karen Wills, we cannot say on this record that failure caused Pole any prejudice at trial. *See Strickland*, 466 U.S. at 688, 104 S. Ct. 2052; *Wiggins*, 539 U.S. at 521, 123 S. Ct. 2527. Andrea and Bonnie Hamilton have both conceded that, at the time of the arrests and trial, their primary concern was to protect Ramon Hamilton. Pole's counsel was able to show Andrea's bias on cross-examination at trial, getting her to concede that she loved Ramon and would not do anything to hurt him. Karen Wills has not recanted to this day, and testified at trial consistently with

her original statement to the police on the night of the murder. Pole assumes that his lawyer could have convinced Andrea to testify in a manner contrary to her original statement and contrary to what she believed was in her brother Ramon's best interest. He also speculates that Karen Wills would have changed her testimony had she been approached by Pole's lawyer. Even if Pole's lawyer had managed either of these highly speculative and unlikely feats, Pole would also have to show a reasonable probability that he would have been acquitted if the jury had been presented with this additional evidence. *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052; *Bynum*, 560 F.3d at 685; *Richardson*, 401 F.3d at 803. In light of the substantial other evidence against him, Pole has failed to make such a showing.

4.

Before addressing the possible prejudice of counsel's performance as a whole, we must address the district court's handling of Pole's *pro se* motion to reconsider. We previously held that the district court erroneously treated the timely motion to reconsider as an unauthorized attempt to litigate a successive collateral attack on his sentence. *See Pole v. Firkus*, Case Nos. 06-2768 & 06-3281, Order, at 2 (7th Cir. Jan. 18, 2007). We concluded that the court should have treated the filing as a timely motion for reconsideration and should have decided it on the merits. Fed. R. Civ. P. 59(e). In his motion to reconsider, Pole pointed out that both the state appellate court and the district court misread Ramon

Hamilton's affidavit. Pole's observation was correct, and the district court should have declined to defer to the state court's findings on Ramon's affidavit. We have not deferred to the state court's findings regarding Ramon's affidavit, and instead have resolved Pole's claims using the assumption that Ramon would have testified that he was present at the shooting. Pole also noted for the first time in the motion to reconsider that the gunshot residue test results would have supported his motion to suppress his confession and would have corroborated Ramon's new account of the crime. As we explained above, however, arguments made for the first time in a motion to reconsider come too late for the court's consideration. *Mungo*, 355 F.3d at 978. Although the district court should have decided Pole's motion to reconsider on the merits, we conclude that the error does not affect the outcome of the appeal.

C.

Finally, we consider whether Pole was prejudiced by any deficiencies in his counsel's performance, an inquiry we make by considering counsel's performance as a whole. *Thompson*, 458 F.3d at 616 (counsel's performance must be addressed as a whole; it is overall deficient performance rather than a specific failing, that constitutes the ground of relief); *Peoples*, 403 F.3d at 848 (same). We assumed above that counsel's decision to rely entirely on the state's witnesses to establish that Pole's confession had been coerced constituted deficient performance. In *Bynum*, the defendant's confessions provided the primary evidence against him. *Bynum*, 560 F.3d at

685. Because the only other evidence supporting Bynum's conviction consisted of a voice identification by a thirteen-year-old boy who had heard the defendant speak on one other occasion, we reasoned that Bynum would have been acquitted had the two confessions been suppressed. In Pole's case, in addition to his signed confession, Pole sought to exclude oral statements he made to two police officers and an assistant state's attorney on the night of the murder. These statements were all consistent with statements Pole made that same evening to Andrea Hamilton and Karen Wills, who also testified at trial. Pole was also identified by other persons present at the tire shop that evening as the person who had inquired about the gang affiliation of the other men at the shop, and as the person who later drove past the shop flashing gang symbols. His car was identified by witnesses, and the murder weapon was recovered from Ramon Hamilton's house, along with a glove marked with Pole's name. Unlike *Bynum*, there was considerable evidence of Pole's guilt beyond the allegedly coerced confessions to law enforcement officers and the prosecutor. We conclude that Pole has failed to demonstrate a reasonable probability that he would have been acquitted had the oral and written confessions been suppressed.

Although we earlier assumed that the failure to put Pole on the stand was outside the wide range of professionally competent assistance, we ultimately find that Pole has failed to demonstrate a reasonable probability that he would have prevailed at the

suppression hearing if he had testified on his own behalf. As with *Bynum*, the court found the officers and assistant state's attorney testifying against Pole were credible. *Bynum*, 560 F.3d at 685. And as with *Bynum*, we defer to this conclusion because it was reached after a hearing on the merits and is supported by the record. *Id.* Had Pole testified at the suppression hearing, he would have had only his own uncorroborated testimony of coercion, with no physical evidence and no other witnesses. In his signed confession, Pole stated that he was treated well by the police officers and the assistant state's attorney, that he was given water and soda to drink, that he was allowed bathroom breaks, that he was not promised anything in exchange for his statement and that he was not threatened in any way. He also stated that he was not under the influence of drugs or alcohol at the time he signed the confession. Weighed against his signed statement and the credible testimony of two police officers and an assistant state's attorney, Pole offers only his uncorroborated testimony that he was kept awake for approximately ten hours before he confessed. We conclude Pole has failed to demonstrate a reasonable probability that he would have prevailed at the suppression hearing if he had testified on his own behalf.

Viewing counsel's performance as a whole, we note first that Pole's lawyer was faced with a client who confessed to no fewer than five people within hours of the murder, including two acquaintances, two police officers and an assistant state's attorney.

By his own admission, Pole instigated the entire incident and then personally tried to hide the murder weapon after the shooting. The gun was found with a glove marked with Pole's name. Although Pole claims not to have been touching the gun, he was the person who was in possession of the gun after the shooting. The basis for Pole's claim that the shooting was accidental is a highly suspect story: a group of drug-addled gang members who were on their way to beat a rival gang member stopped to argue about how to engage the safety on the gun so that they would not accidentally shoot their rival. And while trying to protect their target, they tussled over the gun and accidentally shot an innocent bystander.

Despite these facts, Pole's lawyer successfully argued for the court to instruct the jury on the lesser offense of involuntary manslaughter, and also successfully argued that there were sufficient mitigating factors to preclude imposition of the death penalty. Given the evidence against Pole, these were significant victories. There are certainly things that Pole's lawyer could have done differently and perhaps more effectively. That is not the standard, however, for *habeas* review under the AEDPA. "Habeas relief must not be granted unless the state court's adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the

facts in light of the evidence presented in the State court proceeding." *Julian*, 495 F.3d at 492. *See also Jackson*, 348 F.3d at 662; 28 U.S.C. § 2254(d). The state court's adjudication of Pole's claim of ineffective assistance of counsel does not meet this standard. To demonstrate prejudice from counsel's deficient performance, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052. Any lawyer would have had difficulty persuading a jury to buy the story that Pole wanted to tell, given his multiple confessions and his farfetched explanation for the "accident." Pole has not shown a reasonable probability that the result of the proceeding would have been different even if his lawyer had done everything Pole now argues he should have done. We therefore affirm the district court's denial of his petition for a writ of *habeas corpus*.

AFFIRMED.

Appendix B

In The United States District Court,
For The Northern District of Illinois
Eastern Division

United States of America ex rel. WILLIE POLE, Petitioner,	)	No. 02 C 3393
v.	)	Honorable Charles R. Norgle
BLAIR J. LEIBACH, Warden Danville Correctional Center, Respondent.	)	

OPINION AND ORDER

CHARLES R. NORGLE, District Judge

Before the court is Willie Pole's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, Willie Pole ("Pole"), challenges his conviction under Illinois law for first degree murder and attempted armed robbery. Pole argues that he is entitled to habeas relief based on ineffective assistance of counsel at both the trial and appellate stages of his state case. For the reasons stated below, the petition is denied.

I. BACKGROUND

On habeas review, the court must presume that the state courts' factual determinations are correct unless the petitioner rebuts the presumption by clear and convincing evidence. *See* 28 U.SC. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539, 544-46 (1981); *Todd v. Schomig*, 283 F.3d 842, 846 (7th Cir. 2002). Therefore, the court adopts the Illinois Appellate Court's recitation of facts. *See People v. Pole*, No. 1-96-1030 (1997) (unpublished order under Supreme Court Rule 23)).

A. Facts

On September 27, 1994, the victim, Bernard Jackson ("Jackson") arrived at his job at the E & J Tire Shop to see if he could make some extra money on his day off. Jackson was accompanied by his girlfriend Carmania Payton ("Payton") and their son. Jackson arrived at the tire shop at 5:30 p.m., which closed at 7:00 p.m. Another employee, Antoine Patillo ("Patillo") left a few minutes before closing. It was around that time that Pole arrived in a white Ford Escort. He asked the victim's brother, LaRue Jackson ("LaRue") where Patillo went, and LaRue informed him that Patillo had left.

Moments later, a red van pulled up to the tire shop and three men got out. Pole asked LaRue if the men in the red van were in the Gangster Disciples street gang. LaRue did not know whether they were or not. Pole then walked over to the telephone, at

which time LaRue observed his brother working on the red van. Approximately ten minutes later, Payton told LaRue that Jackson had been shot. LaRue told the police about his conversation with Pole regarding gang affiliation. At 8:30 p.m., the police took LaRue to 86th and Racine where he identified Pole and his car.

At trial, Payton testified that she saw Pole pull up in a compact car, and also observed the red van arrive at the shop. Payton saw Pole go into the shop and then to a pay phone. After Pole left, Payton and her child stood next to Jackson as he worked on a car. As they stood there, Payton heard a gunshot and saw that Jackson had stopped breathing.

John Warren ("Warren"), the owner of E & J Tire Shop testified that he too saw the red van on the night of the murder. Jackson told Warren that he would change the tires on the van, because he needed the extra money. While Jackson was working on the tires, Warren heard a commotion and ran to Jackson. He asked Jackson if everything was all right, when Jackson replied that he was "hit." Cory Lamb ("Lamb"), Corey Harvey ("Harvey"), and Caine Harris ("Harris") were the men in the red van that evening. As Jackson installed the new tires on Lamb's van, the three men saw a white Chevrolet pull up to the tire shop. Lamb testified that when he went outside he told Harvey and Harris that he hoped nothing had gone wrong, because that area was notorious for gang activity. Lamb knew that the Blackstone street gang frequented the area around

the tire shop, and that the Black Disciples were enemies of the Blackstones. Lamb further stated that neither he nor Harris or Harvey were members of the Disciples.

Furthermore, fourteen-year-old Andrea Hamilton ("Hamilton") testified that she knew Pole was a member of the Blackstones. On September 27, 1994, Pole came to Hamilton's house and told her to walk to 86th and Elizabeth streets with him to pick up his car, and there were police in the area. When they arrived at the car, Pole grabbed a gun from the back seat and told Hamilton to hide it. On the way home, Pole told Hamilton that he had shot a "Sipe," or Gangster Disciple at 85th and Racine. When Hamilton arrived home, she hid the gun a drawer. Ramon, Hamilton's brother, came into the room while later and asked if Pole gave her anything. Hamilton gave the gun to her brother. A short time later, police detectives arrived at the house and Ramon turned the gun over to them.

After Pole's arrest, he made varying statements to the police. He first stated that he went to the tire shop to give Patillo some money. When he saw members of the Gangster Disciples, Pole went around the corner and told his Blackstone gang members that members of the rival gang members were at the tire shop. Pole got a gun from his house to prove himself to his fellow gang members. According to Pole's statement, while Ramon showed Pole how to work the safety on the gun, it discharged and fired in the direction of the van. Jackson was

shot in the back, and the bullet exited through his chest. Pole stated that he panicked and ran away.

The detectives then informed Pole that his version of the night conflicted with Ramon's statement. In Ramon's version of the events, Pole and Ramon walked in the alley next to the tire shop, put on ski masks, and when Pole rounded the corner, he aimed the gun at the van, and fired. When confronted with this story, Pole gave a second statement, similar to Ramon's story.

B. Procedural History

Prior to the trial, the court denied Pole's motion in limine to bar reference of his gang activity, and also denied a motion to suppress statements Pole gave to the police. Pole was found guilty in a jury trial, and sentenced to 44 years in prison for murder, and 15 years for attempted armed robbery.

Pole appealed his conviction to the Illinois Appellate Court, where he raised two issues. First, Pole argued, the trial court erred by not inquiring about Pole's claim that his counsel failed to call potential exonerating witnesses. Second, Pole argued that the trial court erred by allowing the jury to hear evidence about his membership in a street gang. On December 22, 1997, the appellate court affirmed Pole's convictions and sentences. Then, on April 14, 1998, Pole requested leave to file a late petition for leave to appeal to the Illinois Supreme Court. That motion was granted on October 7. In his petition for

leave to appeal, Pole argued the same issues in his direct appeal. On December 2, 1998, the Illinois Supreme Court denied the leave to appeal.

Then, on December 29, 1998, Pole filed a petition for post-conviction relief in the Circuit Court of Cook County. The Circuit court dismissed Pole's motion on January 15, 1999. Pole appealed the dismissal, arguing that he was entitled to an evidentiary hearing to develop facts properly alleged in his post-conviction petition, because those facts were not previously raised, and stated a constitutional claim. On April 13, 2001, the Illinois Appellate Court affirmed the dismissal of the post-conviction petition. The Illinois Supreme Court denied Pole's petition for leave to appeal on June 29, 2001. Then, on May 10, 2002, Pole filed his § 2254 motion with the United States District Court, and raised the following issues: 1) ineffective assistance of trial counsel for failure to allow Defendant to testify at the motion to suppress Pole's statements; 2) ineffective assistance of counsel because counsel failed to investigate the case; and 3) ineffective assistance of appellate counsel due to counsel's failure to raise the ineffectiveness of trial counsel. The Government filed its Response on November 20, 2003, and Pole replied on August 16, 2004. Pole's Motion is fully briefed and before the court.

II. ANALYSIS

A. Standard of Decision

Pole's petition is governed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which sets a high hurdle for habeas relief. The statute states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court's decision is *contrary to* clearly established Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts

that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [it]." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court's decision is an *unreasonable application* of clearly established Supreme Court law "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of a particular prisoner's case" or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* In order for a state court decision to be considered "unreasonable" under this standard it must be more than incorrect, it must lie "well outside the boundaries of permissible differences of opinion." *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002); *see also Schultz v. Page*, 313 F.3d 1010, 1015 (7th Cir. 2002) ("The state court decision is reasonable if it is minimally consistent with the facts and circumstances of the case").

Before reviewing the Illinois courts' decisions, however, this court must determine whether Pole fairly presented his federal claims to the state courts. Section 2254 requires a habeas petitioner to exhaust the remedies available in state court prior to pursuing federal habeas relief. *See* 28 U.S.C. § 2254(b)(1)(A). Any claim not presented to the state's highest court is deemed procedurally defaulted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999) (indicating that "a petition for discretionary review

in Illinois' Supreme Court is a normal, simple, and established part of the State's appellate review process").

In addition to exhausting the remedies available in state court, a habeas petitioner is procedurally barred from raising claims in a federal habeas court that he did not raise in the state court proceedings. *See O'Sullivan*, 526 U.S. at 848 (holding that a petitioner's failure to present three claims to the Illinois Supreme Court for discretionary review resulted in a procedural default of those claims). Fair presentment of a constitutional claim requires a habeas petitioner to present both the operative facts and the controlling legal principles to the state court before bringing the claims to a federal habeas court. *Cf. Rodriguez v. Scillia*, 193 F.3d 913, 916 (7th Cir. 1999) (discussing exhaustion of claim) (citing *Picard v. Connor*, 404 U.S. 270, 277 (1971)). Thus, a habeas petitioner procedurally defaults, or waives, any claim raised for the first time in federal court.

Also, federal habeas courts cannot review claims that the state court has disposed of on state law grounds. *See Stewart v. Smith*, 536 U.S. 846, 860 (2002); *see also Lambrix v. Singletary*, 520 U.S. 518, 523-24 (1997) (noting that where "the state law determination is sufficient to sustain the decree, any opinion . . . on the federal question would be purely advisory.") (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). Put another way, federal habeas relief is not available if the state court decision rests on state law that "is independent of the federal

question and adequate to support the judgment." *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). For example, waiver under state law is an independent and adequate state law ground for dismissal that can preclude federal habeas relief. Thus, when a state court determines that a habeas petitioner waives a claim in state court, that waiver is an independent and adequate state law determination that bars federal habeas relief. *See Harris v. Reed*, 489 U.S. 255, 258 (1989) (citing *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977)); *see also Wright v. Walls*, 288 F.3d 937, 947 (7th Cir. 2002) (waiver is an independent and adequate state ground in Illinois); *Patrasso v. Nelson*, 121 F.3d 297, 301-02 (7th Cir. 1997) (comparing waiver and res judicata under Illinois law, and the consequences of each on subsequent federal habeas review). However, for waiver to bar federal habeas review, the last state court to consider the question must have "actually relied on procedural default as the basis for its decision." *Braun v. Powell*, 227 F.3d 908, 912 (7th Cir. 2000). If that is not so, the merits of the issue are preserved for federal habeas review. *See id.* With these principles in mind, we turn to Pole's motion.

B. Pole's Ineffective Assistance of Counsel Claims

In order to establish that his counsel was ineffective, Pole must "show that [his] counsel's performance was deficient, and that the deficiency prejudiced [his] defense." *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). An attorney's

performance is deficient if it falls "below an objective standard of reasonableness." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Benefiel v. Davis*, 357 F.3d 655, 662 (7th Cir. 2004) (quoting *Strickland*, 466 U.S. at 694).

However, these claims were previously raised in Pole's direct appeal of his conviction. *See* Pet.'s § 2254 Mot., Ex. G. The appellate court's decision was based on independent state grounds, and were "adequate to support the judgment." *Coleman*, 501 U.S. at 729. Thus, any issues raised in the current motion are procedurally barred under § 2254.

However, with an abundance of caution, the court will examine the substantive aspects of Pole's motion. Pole does not establish that the state court's decision was contrary to, or an unreasonable application of federal law. *See Williams*, 529 U.S. at 405. Neither party disputes that Pole has fairly presented his federal claims to the state courts. *See* 28 U.S.C. § 2254(b)(1)(A). When a court reviews an ineffective assistance of counsel claim, the court's review is "highly deferential" to the attorney, "with the underlying assumption that 'counsel's conduct falls within the wide range of reasonable professional assistance.' *United States v. Holman*, 314 F.3d 837, 840 (7th Cir. 2002) (quoting *Strickland*, 466 U.S. at 689). There is therefore a strong presumption that Grays's attorney performed reasonably. *See*

Strickland, 466 U.S. at 690; *see also Cooper v. United States*, 378 F.3d 638, 641 (7th Cir. 2004). To succeed in his claim, Pole must show "errors so serious that counsel was not functioning as 'counsel' guaranteed [to him] by the Sixth Amendment...." *See Holman*, 314 F.3d 839 (quoting *Strickland*, 466 U.S. at 687).

Pole first asserts that his counsel's performance was deficient because counsel failed to allow Pole to testify at the motion to suppress. Mot. Under 28 U.S.C. § 2254, at 20. Pole further alleges that defense counsel's performance fell below the *Strickland* standard, because counsel "based the success of the motion on the testimony of the State's witnesses and that this was unsound trial strategy" Resp't Ans., Ex. G. According to Pole, this was so prejudicial, that the outcome of the motion would have been different had he testified. *Id.* Defense counsel's theory was that Pole was young, inexperienced, and naive about the judicial system, as to render his confession involuntary. Additionally, defense counsel cross examined the State's witnesses. Such action, cannot be said to fall below the *Strickland* standard. *Id.*

In rare cases, an attorney's failure to investigate or call certain witnesses can constitute ineffective assistance of counsel. *See Sullivan v. Fairman*, 819 F.2d 1382, 1390 (7th Cir. 1987). However, "[u]sually, counsel's decision not to call a witness is a tactical decision not subject to review." *Barnhill v. Flannigan*, 42 F.3d 1074, 1078 (7th Cir. 1994). The

court is reluctant to engage in second guessing, or "Monday morning quarterbacking," regarding counsel's strategic decisions in this case. *See Harris v. Reed*, 894 F.2d 871, 877 (7th Cir. 1990).

Pole also contends that he was denied effective assistance of trial counsel because counsel failed to "investigate" his case. *See* Resp't Ans,. Ex. G. The appellate court, upon review of Pole's Post-Conviction petition, found the petition and supporting affidavits inadequate to constitute a sufficient claim for relief. *Id.* Ramon's affidavit indicates that he was not present at the time the gun was fired. Such information adds nothing to the issue of Pole's guilt or innocence. Therefore, the affidavit could not change the outcome of Pole's jury trial, and as a result, Pole's ineffective assistance of counsel claim must fail.

Lastly, Pole claims that his appellate counsel was ineffective as a result of his failure to argue the ineffective assistance of trial counsel. "The Sixth Amendment right of effective assistance of counsel applies to a criminal defendant's trial, sentencing, and the first appeal of right." *Jones v. Welborn*, 877 F. Supp. 1214, 1219 (S.D. Ill. 1994) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). The familiar *Strickland* standard therefore applies to defense counsel's performance both at trial, and on direct appeal. *See Lee v. Davis*, 328 F.3d 896, 900 (7th Cir. 2003); *Winters v. Miller*, 274 F.3d 1161, 1167 (7th Cir. 2001). Appellate counsel's performance is objectively unreasonable "if counsel

fails to appeal an issue that is both obvious and clearly stronger than the one that was raised." *Winters*, 274 F.3d at 1167. Prejudice is established where failing to raise such an issue "'may have resulted in a reversal of the conviction, or an order for a new trial.'" *Id.* (quoting *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996)); *see also Lee*, 328 F.3d at 900.

However, as previously stated, defense counsel's actions at the motion to suppress were not "substandard." Counsel's strategy was to advance a theory that Pole was young, inexperienced, and naive about the judicial system. He chose not to allow Pole to testify, because he felt it would not have been beneficial. Had Pole testified, he would have stated that he was "high, had not slept for 30 hours, and that the police told him that the statement Pole signed, but did not read, implicated the co-defendants and not himself." Resp't Ans. at 9, Ex. G. Based on these facts, appellate counsel chose not to argue that trial counsel's action were unreasonable, and fell below the *Strickland* standard. Had Pole testified, there is no indication that the outcome of the motion to suppress would be different. This was not a case where appellate counsel failed "to appeal an issue that is both obvious and clearly stronger than the one that was raised." *Winters*, 274 F.3d at 1167. There is no indication that had appellate raised an ineffective assistance of trial counsel claim, the result would be a "reversal of the conviction, or in an order for a new trial." *Id.* As a result, Pole's claim that appellate counsel was ineffective must fail.

III. CONCLUSION

For the foregoing reasons, Willie Pole's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

IT IS SO ORDERED

ENTER:

/s/CHARLES RONALD NORGLE
CHARLES RONALD NORGLE, Judge
United States District Court

DATED: August 10, 2005

Appendix C

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Charles R. Norgle	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	02 C 3393	**DATE**	8/1/2006
CASE TITLE	Pole vs. Leibach		

DOCKET ENTRY TEXT
Petitioner's Motion for Reconsideration [41-1]

Before the court is Petitioner's Motion styled "Motion for Reconsideration." [41-1] For the following reasons, the Motion is dismissed for lack of jurisdiction.
/s/Charles R. Norgle

STATEMENT

On August 9, 2005, the court denied Petitioner Willie Pole's Motion for Habeas Corpus pursuant to 28 U.S.C. § 2254, attacking his state court conviction for first degree murder and attempted armed robbery. Then, on August 18, 2005, Petitioner filed his "Motion to Reconsider." On November 2, 2005,

the government filed its Response to Petitioner's Motion. The Motion is fully briefed and before the court.

The court "has an independent obligation to satisfy itself that federal subject matter jurisdiction exits before proceeding to the merits in any case." *Am. Gen. Life & Accident Ins. Co.*, 337 F.3d 888, 892 (7th Cir. 2003). Federal courts are "always obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Tylka v. Gerber Prods. Co.*, 211 F.3d 445, 447-48 (7th Cir. 2000) (quotation and internal marks omitted). "The first thing a federal judge should do when a complaint is filed is check to see that federal jurisdiction is properly alleged." *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986). In *Market Street Assocs. Ltd. Partnership v. Frey*, the Seventh Circuit stated: "We remind the bench and bar of this circuit that it is their nondelegable duty to police the limits of federal jurisdiction with meticulous care . . . ." *Market Street Assocs. Ltd Partnership*, 941 F.2d 588, 590 (7th Cir. 1991); *see also Hart v. Terminex Intern.*, 336 F.3d 541, 544 (7th Cir. 2003) (reiterating the admonition that litigants and courts must "meticulously review the limits of federal jurisdiction" so as to avoid the "waste of federal judicial resources and delay of justice" that occurs where a case is found to lack subject matter jurisdiction only after proceeding on the merits); *see also U.S. v. Lloyd*, 398 F.3d 978 (7th Cir. 2005).

Here, Petitioner does not bring his motion pursuant to a specific Federal Rule of Civil Procedure. This alone is sufficient reason to deny the motion. *See United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000) (noting that an undeveloped argument speaks to its paucity, and that courts are not required to consider such arguments). However, the court construes this motion, styled "Motion to Reconsider" as an attempt by Petitioner to file a second § 2254 Motion. It is important to note that "the substance of a party's submission takes precedence over its form." *Guyton v. United States*, - - F.3d - - , 2006 WL 1788972 (7th Cir. June 30, 2006). "The name makes no difference." *Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004).

Petitioner's Motion merely reargues the same claims as in his first Motion under § 2254. Specifically, he alleges an ineffective assistance of counsel claim, arguing that his trial counsel erred by not calling a witness, and not including an affidavit in his appeal. As a result, the court construes this present motion as a mere attempt to file a second Motion under § 2254 without leave of court. *See* 28 U.S.C. § 2244. Because Petitioner did not seek leave of court to file a successive Motion under § 2254, the court is without jurisdiction to decide the merits of this Motion. *See Hart*, 336 F.3d at 544; *Walker v. Roth*, 133 F.3d 454, 455 (7th Cir. 1997).

For the foregoing reasons, Petitioner's Motion styled "Motion to Reconsider" [41-1] is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Appendix D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 9, 2006
Decided January 18, 2007

Before
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

Nos. 06-2768 & 06-3281

WILLIE POLE,
Petitioner-Appellant,

v.

GREGORY FIRKUS,
Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 02 C 3393
Charles R. Norgle, Sr., *Judge.*

ORDER

In this action for collateral relief under 28 U.S.C. § 2254, the district court characterized the petitioner's motion for reconsideration as a second petition for collateral relief and ruled that the district court was without jurisdiction because this court had not given the petitioner permission to file such a petition. The petitioner appealed and his

notice of appeal was presented to this panel to determine whether a certificate of appealability should be granted. For the reasons set forth below, we grant a certificate of appealability.

Willie Pole was convicted in Illinois state court of first degree murder and attempted armed robbery. He was sentenced to concurrent terms of imprisonment of 44 years and 15 years, respectively. The judgment was affirmed by the Appellate Court of Illinois, *People v. Pole*, 718 N.E.2d 1088 (Table) (Ill. App. Ct. 1997), and the Supreme Court of Illinois denied leave to appeal, 706 N.E.2d 501 (Table) (Ill. 1998). Mr. Pole's petition for state post-conviction relief was dismissed by the Circuit Court of Cook County; that dismissal was affirmed by the Appellate Court of Illinois, and the Supreme Court of Illinois denied leave to appeal.

In 2002, Mr. Pole filed a petition for habeas corpus relief in the United States District Court for the Northern District of Illinois. *See* 28 U.S.C. § 2254. He claimed ineffective assistance of trial and appellate counsel. The district court denied the petition. *United States ex rel. Pole v. Leibach*, No. 02-C-3393, 2005 WL 1950367 (N.D. Ill. Aug. 20, 2005). Within 10 days, Mr. Pole filed a motion for reconsideration in which he reasserted the ineffective assistance claims that he had raised in his § 2254 petition.

While his motion to reconsider was pending before the district court, Mr. Pole filed a notice of

appeal from that court's order denying his § 2254 petition. At the same time, he requested a certificate of appealability from the district court. In June 2006, the district court granted a certificate of appealability. That appeal was docketed in this court as No. 06-2768. This court has appointed counsel for Mr. Pole and has set a briefing schedule.

After granting the certificate of appealability, the district court dismissed Mr. Pole's motion to reconsider. In the district court's view, it lacked jurisdiction because the motion for reconsideration was an unauthorized attempt to litigate a successive collateral attack on his sentence without the permission of this court. *See* 28 U.S.C. § 2254. Mr. Pole then filed an "amended notice of appeal" that added the denial of his motion to reconsider. Mr. Pole now seeks a certificate of appealability with respect to this claim.

The district court erred in characterizing Mr. Pole's filing a successive habeas petition. The court should have treated that filing as a timely filed motion for reconsideration and should have decided it on the merits. *See* Fed. R. Civ. P. 59(e).

The notice of appeal filed by Mr. Pole prior to the district court's disposition of his motion for reconsideration was premature. It became operative, however, when the district court ruled on the motion for reconsideration. *See* Fed. R. App. P. 4(a)(4)(B)(i). It therefore was sufficient to bring to this court the underlying order denying relief to Mr. Pole. *Id.*

However, after the district court disposed of the post-trial motion, Mr. Pole filed a timely *amended* notice of appeal in which he made clear that he intended to appeal *both* the district court's original order *and* the district court's subsequent ruling on the motion for reconsideration. *See* Fed. R. App. P. 4(a)(4)(B)(ii). Because a certificate of appealability is a jurisdictional prerequisite for appeal, *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003), and, because such a certificate must be issue specific, 28 U.S.C. § 2253(c)(3), this court can consider the district court's denial of relief under the motion for reconsideration only if the certificate of appealability issued by the district court is amended by the district court or by a judge of this court. *See* 28 U.S.C. § 2253(c)(1). Rule 22(b) of the Federal Rules of Appellate Procedure requires that a district court either issue a certificate of appealability or state why one was not issued. Because of the district court's misstep in treating the motion for reconsideration as a successive habeas petition, that court understandably did not address whether a certificate of appealability ought to be granted with respect to the amended notice of appeal that brings before this court *both* the original order denying relief *and* the denial of the motion for reconsideration. Normally, we would remand this matter to permit the district court to address whether a certificate should be issued with respect to the denial of the motion for reconsideration. Following that course in this case, however, would exalt form over substance and result in an intricate procedural web that would violate the manifest intent of Congress that habeas petitions be

adjudicated with dispatch. Here, the view of the district court with respect to this matter is clear on the record; the district court believed, erroneously, that the motion for reconsideration was something else—a successive petition beyond its jurisdiction. Secondly, the issue raised in the petition for rehearing is the same issue as the one raised in the underlying petition for relief, and the district court *has granted* a certificate of probable cause with respect to this issue. In short, rather than engage in a time consuming remand and require a busy district court to revisit this matter at this juncture, the matter ought to be addressed here.

Accordingly, the certificate of appealability granted by the district court is amended to include the district court's denial of relief on the same issue in the disposition of the motion for reconsideration. Therefore, both the initial denial of the petition for relief under 28 U.S.C. § 2254 and the denial of the petitioner's motion for reconsideration can be considered by the merits panel.

This appeal shall be consolidated with appeal No. 06-2768 for purposes of briefing and disposition. We sua sponte appoint Jerold Solovy, Jenner and Block, One IBM Plaza, Chicago, IL 60611 to represent Mr. Pole pursuant to the provisions of the Criminal Justice Act. Briefing in this consolidated appeal shall proceed pursuant to the court's order dated December 14, 2006.

Appendix E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under

this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Fed Rule of Civ Pro 59. New Trial; Altering or Amending a Judgment

(a) In General.

(1) ***Grounds for New Trial.*** The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) ***Further Action After a Nonjury Trial.*** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) ***Time to File a Motion for a New Trial.*** A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) ***Time to Serve Affidavits.*** When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(d) ***New Trial on the Court's Initiative or for Reasons Not in the Motion.*** No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) ***Motion to Alter or Amend a Judgment.*** A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

Appendix F

IN THE

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. WILLIE POLE,	)	No. 02 C 3393
PETITIONER,	)	THE HONORABLE CHARLES R.
V.	)	NORGLE, SR.,
	)	JUDGE
BLAIR J. LEIBACH, RESPONDENT.	)	PRESIDING.

PETITIONER pro se
MOTION FOR RECONSIDERATION

Petitioner, Willie Pole, pro'se, in response to the denial of petition for writ of habeas corpus pursuant to 28 U.S.C. s 2254 by this Honorable Court, he files this pro'se motion to reconsider it's order:

INTRODUCTION

The Petitioner, Willie Pole, petition for writ of habeas corpus pusuant to 28 U.S.C. s 2254 challenged his conviction under Illinois law for first degree murder and attempt armed robery.

Pole argued that he is entitled to habeas relief based on ineffective assistance of Counsel at both the trial and appellate stage and that the state Court misconstrued the contents of one of the newly discovered affidavit and failed to rule on any of the other Affidavit. Combine as a whole the Affidavit showed that he is actually innocence of first degree murder and attempt armed robbery.

This Honorable Court deied the Petition on August 10, 2005 This Honorable Court stated that the Petitioner was not entitle to Habeas Corpus relief because the Petitioner State Court's decision was not contrary to or involved an unreasonable application of Federal Law nor was it's decision based on unreasonable determine of fact in light of evidence presented in the State Court.

ARGUMENT

In this Motion for reconsideration the Petitioner will point out how he should have received relief under U.S.C. 2254 (D) 2. Pursuant to the U. S. Supreme Court Ruling in Wiggin v. Smith 123 S.CT. 2527 (2003).

I

The Wiggin v. Smith case is very similar to the Petitioner's Case. In the State Court he raise an ineffective assistance of Counsel claim, in that his trial Counsel fail to investigate his case. The Maryland Court of Appeal denial Wiggins State

relief on the ground that Wiggin's Trial Counsel did investigate his case and was aware of wiggin background. However our Great U. S. Supreme Court held that the evidence that the Maryland Court of appeal rely upon was erroneous factual finding:

> Additionally, the Court based its conclusion, in part, on a clear factual error that the "social service records... recorded incidences of Sexual abuse". 352 Md, st 608-609.... As the state and the United States now concede the records contain no mention of sexual abuse, much less of the repeated molestations and rape of petitioner detailed in the Selvog report. The State Court's assumption that the records documented instances of this abuse has been shown to be incorrect by clear and convincing evidence" 28 U.S.C. 2254 (e)(l) and reflect "and unreasonable determination of the facts in light of the evidence presented in the State Court proceeding" 2254 (d)(2) This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision. Wiggin v. Smith 123 S.CT 2527 at 2539.

In this Honorable Court denial of the Petitioner habeas corpus petition, the state court ruling on the Petitioner Newly discovered affidavits was upheld as reasonable in the light of the evidence.

The Petitioner beg to differ. In this Court's denial, the Court Support the State Court action:

> The Appellate court, upon review of Pole's Post-conviction petition, found the petition& supporting affidavit inadequate to constitute a sufficient claim for relief. Id Ramon's Affidavit indicates that he was not present at the time the gun fired. Such information adds noting to the issue of Pole's guilt or innocence. Therefore, the affidavit could not change the outcome of Pole's jury trial, and as a result, Pole's claim must fail. (p.9 of the this Court opinion)

As Wiggin v Smith SUPRA, the Illinois Court of appeal is incorrect. The State Court refused to even speak to Andrea Hamiltion and Bonnie Hamiltion affidavit. Furthermore, the State court miscontrued the affidavit of Ramon Hamilton. The Petitioner has pointed it out in his briefs. Ramon Hamilton is so critical to the Petitioner case. His Affidavit tell that it was not the Petitioner who fired the shot that killed the victim. It was in fact, Ramon Hamilton, Thadeus, and Lontray wrestling over the gun as it fired. Furthermore, he only said it was the Petitioner so save himself from jail time.

This whole case is surround by Ramon and his family (the Hamilton):

First their were no testifying witness at the Petitioner Trial. However, the Assistant States Attorney Testified at the Petitioner trial that in the Police station Ramon told him that the Petitioner fired one shot in the direction of the red van. Trial Transcript J. 80-115)
2. If Ramon affidavit is believed he would have stated the gun accidental/recklssly fired as he, lontray and Thadeus wrestled over the gun. See Ramon Affidavit P.2 line 15 attached exhibit 1)
3. Also Ramon explained that he pointed the finger at the petitioner in the police Station to save him self.
(See Ramon attached affidavit)

Therefore, the state court was totally wrong when it denied Petitioner relief because Ramon Hamilton Affidavit stated he was present at the time of the shot was fired.

Ramon Affidavit is so critical because it was the state Theory that the petitioner went to the shop to robbery Corey Lamb and instead fired a shot at rival gang members. It was the defense theory that the gun accidentally fired. There were not testifying eye witness; thus, the trial court gave the jury instruction on involuntary manslaughter for the defense. He gave the prosecution first degree instruction. The Petitioner was found guilty of first degree murder.

If Ramon would have testified, the would have been the only eye witness. the would have testified that the Petitioner was standing off to the side as he Lontray & Thaddeus wrestled over the gun. (Ramon Aff. P.2 line 15). This evidence would have showed that the gun fired accidently/ recklessly which could only prove involuntary manslaughter. Thus, the Petitioner could not be sentenced to 44 years for first degree murder for a crime he did not commit.

Therefore, the state court's ruling the RAmon was not present at the time of the shooting was totally based on unreasonable determination of the facts in light of the evidence in the state proceeding governed by 28 U.S.C. 2254 (d)(2) Wiggins vs. Smith 123 S.CT 2527.

Furthermore, the Affidavits of the other Hamiltons was not even spoke upon in the state court or this district court. There affidavit are very important to the petition case.

The new evidence consisted of affidavits verifying Petitioner's account of the incident. They corroborate the defense theory of the case and uncut the state's theory. Two of the the affidavits were recantations of testimony given by the state witnesses during the trial.

In fact at the trial sentencing, the Honorable Judge Simmion used one of the witness to refute the Petitioner claim of innocence:

> Andrea Hamilton testified that the Petitioner told here that he shot a sipe on 85th street. She put the gun in a drawer and that refutes the defendant's latest protestation of innocence. See Trial transcripts in exhibit 3 P. N. 72-73.

Andrea Hamilton post-conviction affidavit corroborated the affidavits of petitioner & Ramon. Andrea claimed the police pressured her into making a false accusations the Petitioner. The Police told her that in oreder to save her brother, she had to implicate the petitioner as the shooter. For that reason alone, Andrea signed what the Police gave her to sign & testified falsely during petitioner's trial. Andrea Post-conviction affidavit recanted that false testimony.

Bonnie Hamilton-Resse, the mother of Andrea and Ramon submitted another uncontradicted affidavit. she maintain that te Police triceked her into getting RAmon to confess byinsisting that this would keep him out of jail. Mrs. Hamilton- Resse stated in her sffidacit that she believed what the police were telling her (that her son would received favorable treatment if he implicated Petitioner. Also, she encouraged her daughter, Andrea, to give false testimony against the Petitiioner. Mrs. Hamilton Resse's Post convictiion affidavit offered details about the events that match the post trial statement given by Petitioner, Ramon & Andrea.

These Affidavits takeing as a whole shed a whole new light on the petitioner's case. Thus, to over look these affidavit is and unreasonable determination of the facts in light ofthe evidence presented in the state court proceeding 2254 governed by 28 U.S.C. 2254 (d) (2).

II

THE STATECOURT RULING WAS BASED ON AN UNREASONABLE DETERMINATION OF FACTS GIVEN THE RECORDED EVIDENCE

In the petitioner state court proceeding he raise several issue of trial counsel failure to investigate & interview an exonerating witness, specifically that there were evidence to refute the state court number one evidence. This Court and the state denied the petitioner relief on evidence that would prove the petitioner innocence.

The appellate court ruled there was ample evidence against the Petitioner, including his written confession. To refute the State Court ruling the Petitioner state the following: If the Trial Counsel would have present this evidence the motin to suppress hearing or at trial the petitioner would have not been found guilty of first degree murder.

The Assistant state attorney Biesty testified that he wrote the alleged confession, (trial transcripts J. 88-115) and after some convicing got the petitioner to sign it, after he continuously confronted the

Petitioner with Ramon theory of events. Furthermore, the alleged statement can be disproveed. ON page two the the Petitioner alleged confession A.S.A. Biesty wrote "Willie Pole stated he put on his whitt work glove with the name Pole. Willie identified a picture of the glove ....Willie state he just pop off a round.

On August 22, 1995 A.S.A. Mr. Rimas F. CERnius received the result of the gunshot residu e test done the alleged glove the petitioner allegedly had on his hands when the gun was fired. The test yield that no gun shot resideue particles were found. The result was forwared to defense Counsel, Gilbert Schumn. If Counsel would present the result of the Petitioner negative gun shot residue tests on the defendant hands and alleged glove with the affidavit of Ramon Hamilton would have show that it was impossible that the Peittioner fired that fatal shot. This negative gun shot residue test would have been the scientific evidence to prove the Petitioner did not fire a gun that night and the the alleged confession was not true. (Gun shot residue exhibit 5 attached)

To prevail on a claim based on failure to call a witness, Petitioner must make a specific & affirmative showing as to what the missing evidence would have been ...&prove that this witness testimony would have produced a different result. Berry v Gramely 74 F SUPP. 2d 808.

Mr. MArk S. Germani PH.D. senior Scientist of M.V.A. INc. conducted the test on the gloves, which

yield the negative result. Ramon Hamilton Affidavit support why the their was no gunshot residue on the petitioner hand or glove. Because he was the one that fired the gun that night.

These two witnesses alone would have change the out come of the Petitioner trial. These issue was properly preserved in the State Court and placed before this Court.

For the foregoing reason this petitioner prays this court reconsider it's decision to deny the Petitioner writ of Habeas Corpus and issue a writ of habeas corpus & order him released peneding a new trial.

/s/ Willie Pole

Respectfully, Submitted
pro'se
WILLIE Pole
B-74292
P.o Box 1000
Lincoln, Ill 62656